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Mohamad Fitri bin Fauzi v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(M)-444–09 OF 2018
MARY LIM, NANTHA BALAN AND SUPANG LIAN JJCA
17 FEBRUARY 2020

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 302 of Penal Code for murder — Appellant convicted and sentenced to death — Whether circumstantial evidence adduced by prosecution was sufficient to establish prima facie case against appellant — Whether evidence as a whole had established beyond reasonable doubt that it was appellant who had used shotgun and was responsible for murder of deceased — Penal Code s 302

D

The appellant was charged under s 302 of the Penal Code for the murder of the deceased. The appellant was the principal accused. Three other persons were charged with abetting the appellant to commit the said murder, ie the second, third and fourth accused. On 21 June 2016, at about 8.45am, PW8 was on his way home when he noticed a Toyota Hilux had stopped at the traffic lights intersection near E-Mart, Jalan Kuala Baram Bypass. The Toyota Hilux did not move when the traffic lights changed and gunshot marks were seen on the driver's side. He immediately called the police and the investigating officer ('PW28') and an ambulance team arrived thereafter. A medical assistant at the scene checked for the driver's vital signs and conducted basic tests for signs of life and confirmed the deceased had died. Based on the autopsy report, the cause of death was determined to be neck and head injuries due to gunshot wound. The appellant was arrested on 30 June 2016 and was taken to the Miri General Hospital where he gave a blood sample for purposes of DNA testing/profiling to be carried out. On 1 July 2016, the police arrested a furniture shop owner ('PW25') in the course of their investigations into the murder of the deceased. PW25 provided information, inter alia, that the appellant had given him a shotgun to hide. PW25 led PW28 and his team to his house and showed where he had hidden the shotgun in a bag in the ceiling of the house. PW28 seized a shotgun together with other items from the bag. PW28 also recovered a face mask from the same bag and 16 shotgun cartridges and 12 gauge cartridge shells. The learned judge acquitted and discharged the second, third and fourth accused without their defence being called. He held that there was no evidence to connect them to the murder of the deceased. The learned judge found that based on the circumstantial evidence, the prosecution had proven all the ingredients for the offence of murder. The learned judge held that a prima facie case had been established against the appellant and

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A accordingly called upon the appellant to enter his defence. At this point, the appellant tendered a notice of alibi. The learned judge found the appellant guilty of the offence of murder and sentenced him to death. Hence, this appeal. The appellant challenged the circumstantial evidence relied on by the prosecution and accepted by the learned judge. The question was whether the B circumstantial evidence adduced by the prosecution was sufficient to establish a prima facie case against the appellant and whether the evidence as a whole, including the defence that was advanced by the appellant had established beyond reasonable doubt that it was the appellant who had used the shotgun and was responsible for the murder of the deceased.

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Held, dismissing the appeal; and affirming the conviction and sentence:

(1) Looking at the learned judge's approach to and his assessment of the evidence of the former headman of a longhouse in Sungai Bekelit Bekenu D ('PW20') on the threats by the appellant and the third accused and the deceased's intimation to PW20 that the deceased had been threatened by the people from Tung Huat Pelita Niah Plantation Sdn Bhd, it was clear that the learned judge believed PW20's evidence on these matters. The fact that the learned judge did not mention anything about PW20's E credibility did not render him ipso facto a witness who was lacking in credibility. There was a series of circumstances and coincidences which when considered and evaluated in the aggregate (and not in isolation) pointed conclusively and irresistibly to the guilt of the appellant (see paras 155 & 157–158).

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(2) By reason of the appellant's failure to put to PW25 that the transaction took place on 30 and 31 May 2016 and not as he had described it, the reasonable inference was that it was an 'afterthought' or 'recent invention'. Whilst there was no duty or obligation or burden on the G accused to prove his innocence, a failure to put the necessary version to the prosecution's witness would have a deleterious and damaging effect on the credibility of the accused when he later testified and gave a different version (see paras 178 & 180).

(3) The learned judge had not erred when he concluded that there was an evil H purpose for the test-firing of the weapon in a secluded place in Bakam. It was also not wrong for the learned judge to have associated the evil purpose with the meeting between the appellant and PW25 outside the pub where the appellant had shown the photo of a male person and said that he 'wanted' the man and asked PW25 whether he wanted to join in I doing 'something'. It hardly mattered whether the 'first contact' between the appellant and PW25 took place in the middle of June 2016. What really mattered was that there was an initial 'contact' and at some point in time after the first contact, the weapon was handed over to PW25 for 'safe-keeping' (see paras 187–188 & 191).

(4) The presence of the appellant's DNA on the face mask was very telling and supported the inference that the shotgun was used for a sinister purpose — the murder of the deceased. There was and could be no other explanation for the use of a face-mask (see para 202).

(5) There were no witnesses who were called who could have corroborated the appellant's testimony on his alibi. The alibi defence was a sham and it was quite obviously the product of a 'recent invention.' The appellant's denials and his purported alibi were of such a nature and quality that when they were tested against the preponderance of evidence, they were incapable of creating or raising a reasonable doubt as to the guilt of the appellant (see paras 207 & 213–214).

(6) The appellant had not raised any reasonable doubt in relation to his culpability in the murder of the deceased. The circumstantial evidence tendered by the prosecution irresistibly proved that it was the appellant who murdered the deceased on 21 June 2016 as per the charge and that the evidence did not point to any other explanation which may exculpate the appellant. Consequently, the conviction for the offence of murder under s 302 of the Penal Code was safe and there was no reason to disturb the trial judge's findings of fact (see paras 219–220 & 222).

[Bahasa Malaysia summary

Perayu didakwa di bawah s 302 Kanun Keseksaan kerana membunuh si mati. Perayu adalah tertuduh utama. Tiga orang lain dituduh bersubahat dengan perayu untuk melakukan pembunuhan tersebut, iaitu tertuduh kedua, ketiga dan keempat. Pada 21 Jun 2016, kira-kira jam 8.45 pagi, PW8 dalam perjalanan pulang ke rumah ketika dia melihat sebuah Toyota Hilux telah berhenti di persimpangan lampu isyarat berhampiran E-Mart, Jalan Kuala Baram Bypass. Toyota Hilux tidak bergerak ketika lampu isyarat berubah dan tanda tembakan kelihatan di sebelah pemandu. Dia segera memanggil polis dan pegawai penyiasat ('PW28') dan pasukan ambulans tiba selepas itu. Seorang pembantu perubatan di tempat kejadian memeriksa tanda-tanda vital pemandu dan melakukan ujian asas untuk tanda-tanda kehidupan dan mengesahkan si mati telah meninggal dunia. Berdasarkan laporan autopsi, penyebab kematian adalah ditentukan kecederaan leher dan kepala akibat luka tembakan. Perayu ditangkap pada 30 Jun 2016 dan dibawa ke Hospital Besar Miri di mana dia memberikan sampel darah untuk tujuan ujian/profil DNA dijalankan. Pada 1 Julai 2016, polis menahan seorang pemilik kedai perabot ('PW25') semasa siasatan mereka terhadap pembunuhan si mati. PW25 memberikan maklumat, antara lain, bahawa perayu telah memberinya senapang patah untuk disembunyikan. PW25 membawa PW28 dan pasukannya ke rumahnya dan menunjukkan di mana dia menyembunyikan senapang patah di dalam beg di siling rumah. PW28 merampas senapang patah beserta barang-barang lain dari dalam beg. PW28 juga mendapatkan topeng muka dari beg yang sama dan 16 kartrij senapang patah dan 12 tolok

kelongsong kartrij. Hakim yang bijaksana melepaskan dan membebaskan tertuduh kedua, ketiga dan keempat tanpa pembelaan dipanggil. Beliau berpendapat bahawa tidak ada bukti yang menghubungkan mereka dengan pembunuhan si mati. Hakim yang bijaksana mendapati bahawa berdasarkan keterangan ikut keadaan, pihak pendakwaan telah membuktikan semua unsur untuk kesalahan pembunuhan. Hakim yang bijaksana berpendapat bahawa kes prima facie telah dibuktikan terhadap perayu dan dengan demikian meminta perayu untuk membela diri. Pada ketika ini, perayu mengemukakan notis alibi. Hakim yang bijaksana mendapati perayu bersalah atas kesalahan membunuh dan menjatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu mencabar keterangan ikut keadaan yang diandalkan oleh pihak pendakwaan dan diterima oleh hakim yang bijaksana. Persoalannya adalah sama ada keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan cukup untuk membuktikan kes prima facie terhadap perayu dan sama ada keterangan secara keseluruhan, termasuk pembelaan yang dikemukakan oleh perayu telah membuktikan melampaui keraguan munasabah bahawa perayulah yang telah menggunakan senapang patah dan bertanggungjawab atas pembunuhan si mati.

Diputuskan, menolak rayuan; dan mengekalkan sabitan dan hukuman:

(1) Melihat pendekatan dan penilaian hakim yang bijaksana terhadap keterangan bekas ketua rumah panjang di Sungai Bekelit Bekenu ('PW20') mengenai ugutan oleh perayu dan tertuduh ketiga dan intimidasi si mati kepada PW20 bahawa si mati telah diancam oleh orang-orang dari Tung Huat Pelita Niah Plantation Sdn Bhd, jelas bahawa hakim yang bijaksana mempercayai keterangan PW20 mengenai perkara-perkara ini. Fakta bahawa hakim yang bijaksana tidak menyebut apa-apa mengenai kredibiliti PW20 tidak membuatnya secara langsung menjadi saksi yang kurang mempunyai kredibiliti. Terdapat serangkaian keadaan dan kebetulan yang ketika dipertimbangkan dan dinilai secara agregat (dan bukan secara terpisah) menunjukkan secara pasti dan jelas terhadap kesalahan perayu (lihat perenggan 155 & 157–158).

(2) Atas sebab kegagalan perayu untuk dikemukakan kepada PW25 bahawa transaksi itu berlaku pada 30 dan 31 Mei 2016 dan tidak seperti yang dijelaskannya, kesimpulan yang munasabah adalah bahawa ia adalah 'pemikiran semula' atau 'perekaan baru'. Walaupun tidak ada tugas atau kewajipan atau beban kepada tertuduh untuk membuktikan tidak bersalah, kegagalan untuk mengemukakan versi yang diperlukan kepada saksi pendakwaan akan memberi kesan buruk dan merosakkan kredibiliti tertuduh ketika dia kemudian memberi keterangan dan memberikan versi yang berbeza (lihat perenggan 178 & 180).

(3) Hakim yang bijaksana tidak terkhilaf ketika beliau membuat kesimpulan bahawa ada tujuan jahat untuk menembak senjata di tempat terpencil di

Bakam. Juga tidak salah bagi hakim yang bijaksana untuk mengaitkan tujuan jahat itu dengan pertemuan antara perayu dan PW25 di luar pub di mana perayu telah menunjukkan foto seorang lelaki dan mengatakan bahawa dia 'menginginkan' lelaki itu dan bertanya kepada PW25 sama ada dia mahu turut serta dalam melakukan 'sesuatu'. Tidak menjadi masalah sama ada 'hubungan pertama' antara perayu dan PW25 berlaku pada pertengahan bulan Jun 2016. Apa yang penting ialah terdapat 'hubungan' awal dan pada suatu ketika selepas hubungan pertama, senjata itu diserahkan kepada PW25 untuk 'penyimpanan' (lihat perenggan 187–188 & 191).

(4) Kehadiran DNA perayu pada topeng muka sangat jelas dan menyokong kesimpulan bahawa senapang patah itu digunakan untuk tujuan jahat — pembunuhan si mati. Tidak ada penjelasan lain untuk penggunaan topeng muka (lihat perenggan 202).

(5) Tidak ada saksi yang dipanggil yang dapat membuktikan keterangan perayu mengenai alibinya. Pembelaan alibi adalah satu penipuan dan ia jelas merupakan hasil dari 'perekaan baru'. Penafian perayu dan alibi yang dikatakan merupakan sifat dan kualiti sehingga ketika mereka diuji terhadap keterangan yang banyak, mereka tidak dapat membuat atau menimbulkan keraguan yang wajar mengenai kesalahan perayu (lihat perenggan 207 & 213–214).

(6) Perayu tidak menimbulkan keraguan yang munasabah sehubungan dengan kesalahannya dalam pembunuhan si mati. Keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan membuktikan bahawa perayu yang membunuh si mati pada 21 Jun 2016 mengikut pertuduhan dan keterangan tersebut tidak menunjukkan penjelasan lain yang dapat membebaskan perayu. Oleh yang demikian, sabitan atas kesalahan membunuh di bawah s 302 Kanun Keseksaan adalah selamat dan tidak ada alasan untuk mengganggu penemuan fakta hakim bicara (lihat perenggan 219–220 & 222).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Belhaven and Stenton Peerage (1875) 1 App Cas 278, HL (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)
Ghambhir v State of Maharastra AIR 1982 SC 1157, SC (refd)
Liew Kaling & Ors v PP [1960] 1 MLJ 306b; [1960] 1 LNS 60, CA (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647; [2009] 1 CLJ 154; [2008] 1 LNS 547, CA (refd)
Pathmanabhan a/l Nalliannen v PP and other appeals [2017] 3 MLJ 141; [2017] 4 CLJ 137; [2017] 3 AMR 105; [2017] AMEJ 371, FC (refd)

Pie Bin Chin v PP [1985] 1 MLJ 234 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16; [1971] 1 LNS 115 (refd)
Sukhvinder Singh Naldip Singh v PP and another appeal [2014] 5 CLJ 574, CA (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Legislation referred to

Criminal Procedure Code ss 182A, 402A
Evidence Act 1950 ss 8(1), 103
Penal Code ss 299, 300, 300(a), (b), (c), (d), 302
Prevention of Crimes Act 1959

Appeal from: Criminal Trial No MYY-45B-3/11 of 2016 (High Court, Miri)

Ranbir S Sangha (Ranbir S Sangha & Co) for the appellant.
Nik Suhaimi bin Nik Sulaiman (Muhammad Azmi bin Mashud and Jasmee Hameesa bt Jaafar with him) (Attorney General's Chambers) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] Mohamad Fitri Pauzi (KPT 870604–13–5627) ('the appellant') was charged under s 302 of the Penal Code (Revised 1997) (Act 574) for the murder of one Bill ak Kayong (KPT 731208–13–5051) ('the deceased'). On 10 August 2018, the learned judge of the High Court in Miri, Sarawak found the appellant guilty of the offence of murder and sentenced him to death accordingly. The appellant now appeals to this court.

THE CHARGE

[2] The charge against the appellant reads as follows:

> That you MOHAMAD FITRI PAUZI (KPT-870604-13-5627) on 21 June 2016 at about 8.20 a.m., at a traffic light intersection near E-Mart supermarket, Jalan Kuala Baram Bypass, in the district of Miri, in the State of Sarawak, did commit murder by causing the death of BILL ANAK KAYONG (KPT: 731208-13-5051), and you thereby committed an offence punishable under section 302 of the Penal Code [Act 574].

THE TRIAL

[3] The prosecution's case against the appellant was based entirely on circumstantial evidence. There were no eye witnesses or any direct evidence which implicated the appellant to the crime. The appellant (first accused) was the principal accused.

[4] Three other persons were charged with abetting the appellant to commit the said murder, namely Lie Chang Loon ('second accused'), Chin Wui Chung ('third accused') and Stephen Lee Chee Kiang ('fourth accused'). A

[5] The trial in the High Court in Miri commenced on 7 March 2017. The prosecution closed their case on 31 March 2017. The case for the prosecution was that on 21 June 2016 the appellant had discharged a shotgun (exh P132) at close range and fatally wounded the deceased. B

[6] There is no doubt that the deceased was killed by gunshot wounds which were inflicted upon him whilst he was in a Toyota Hilux vehicle bearing registration No QMU 6462 and the wounds were consistent with gunshots from a shotgun. The key question is whether exh P132 was the weapon which was used to kill the deceased and whether the appellant was the shooter. C

[7] On 6 June, 2017, the learned judge acquitted and discharged the second accused, third accused and the fourth accused without their defence being called. He held that there was no evidence to connect them to the murder of the deceased. D

[8] As for the appellant, the learned judge found that based on the circumstantial evidence, the prosecution had proven all the ingredients for the offence of murder. The learned judge held that a prima facie case had been established against the appellant. Accordingly, the learned judge called upon the appellant to enter his defence. E

[9] The appellant elected to testify under oath and be cross-examined. The next set of trial dates were 14 to 16 June 2017. The appellant then filed a notice of alibi dated 12 June, 2017 ('the notice of alibi') pursuant to s 402A of the Criminal Procedure Code. F

[10] Section 402A reads as: G

402A Alibi

(1) The Court shall, at the time the accused is being charged, inform the accused as to his right to put forward a defence of alibi. H

(2) Where the accused seeks to put forward a defence of alibi, *he shall put forward a notice of his alibi during the case management process.*

(3) Notwithstanding subsection (2), where the accused has not put forward a notice of his alibi during the case management process, he may adduce evidence in support of an alibi at any time during the trial subject to the following conditions: I

(a) The accused has given a written notice of the alibi to the Public Prosecutor; and

(b) The Public Prosecutor is given a reasonable time to investigate the alibi before such evidence can be adduced.

(4) The notice required under this section *shall include particulars of the place* where the accused claims to have been at the time of the commission of the offence with which he is charged, *together with the names and addresses of any witnesses whom he intends to call* for the purpose of establishing his alibi. (Emphasis added.)

[11] The notice of alibi reads as follows:

NOTICE OF DEFENCE OF ALIBI

(Section 402A of Criminal Procedure Code)

TAKE NOTICE THAT the 1st Accused, MOHAMAD FITRI PAUZI is seeking to put forward a Defence of Alibi in support of his case which has been set down for trial at Miri from 14th to 16*th* June 2017 at 9.00a.m. on each day.

The above said MOHAMAD FITRI PAUZI will be *adducing evidence* that on 21st June 2016 at about 8.20 a.m., *he was at food stalls by the road side at the junction between Jalan Sukma and Lorong Desa Senadin 2C, Senadin, Miri, Sarawak, before during and subsequent to the time of the offence with which he is charged.* (Emphasis added.)

[12] The trial was then adjourned as the prosecution appealed to the Court of Appeal against the acquittal and discharge of the second accused, third accused and fourth accused. The trial was then held in abeyance pending the outcome of the prosecution's appeal. The adjournment was also to enable the police to investigate the contents of the notice of alibi. On 9 April 2018, the Court of Appeal dismissed the prosecution's appeal. The trial vis a vis the appellant resumed on 21 May 2018. The appellant was the sole witness for the defence. He was duly cross-examined by the deputy public prosecutor ('the DPP'). The appellant did not call any witnesses to support his alibi.

[13] On 10 August 2018, the learned judge found the appellant guilty of the murder of the deceased and sentenced him to death. The appellant's appeal was heard on 17 February 2020 in Kuching, Sarawak. We dismissed the appeal and affirmed the appellant's conviction under s 302 of the Penal Code. These are the reasons for our unanimous decision.

BRIEF FACTS

[14] The deceased was a native Iban. He was at the material time, the special assistant to Dr Michael Teo Yu Keng (PW19), who was the Member of Parliament for the Parliamentary constituency of Miri. On 21 June 2016, at

about 8.45am, PW8 (Manuel Maratis) was on his way home when he noticed that a Toyota Hilux bearing registration number QMU 6462 ('the Toyota Hilux') had stopped at the traffic lights intersection near E-Mart, Jalan Kuala Baram Bypass, Miri.

[15] The Toyota Hilux did not move when the traffic lights changed. PW8 also saw gunshot marks on the driver's side of the Toyota Hilux. He immediately called the police. The patrol car officers arrived at the scene at 9.06am. They cordoned off the area around the Toyota Hilux with traffic cones and yellow police tape while waiting for an ambulance team and the investigating officer of the case to arrive. The investigating officer, Inspector Lee Chee Keat (PW28) and the ambulance team arrived soon after.

[16] The medical assistant at the scene (PW7) (Mohammad Salman bin Maliki) checked for the driver's vital signs and conducted basic tests for signs of life and confirmed that the deceased had died. He noted that there was a massive injury to the right side of the neck. PW28 commenced investigations immediately. The body of the deceased was sent for autopsy. Based on the autopsy report, the cause of death was determined to be neck and head injuries due to gunshot wound (exh P43). The body was identified by Hasyikin Hatta (PW10), the widow of the deceased. Apart from PW8, another passer-by, ie Enrico Dumaog Erat (PW9) testified that he was at the traffic lights in question on that fateful day when he heard a gunshot. He saw that the glass window of a Toyota Hilux had cracked.

[17] The appellant was arrested on 30 June 2016 by ASP Lawrence ak Rawieng (PW 13) at the Miri Central Police Station. He was taken to the Miri General Hospital where he gave a blood sample for purposes of deoxyribonucleic acid ('DNA') testing/profiling to be carried out. The other accused persons were arrested on various other dates.

[18] On 1 July 2016 the police arrested Lau Lee Shen (a furniture shop owner) (PW25) in the course of their investigations into the murder of the deceased. On 5 July 2016, PW28 (together with one ASP Govindan) interrogated PW25. PW25 provided information, inter alia, that the appellant (known by his nickname 'Apek') had given him a shotgun to hide.

[19] PW25 led PW28 and his team to his house located at No 9, Jalan Hainam Lam, km2, Jalan Miri-Bintulu. PW25 showed where he had hidden the shotgun that the appellant had given him to hide. PW25 had hidden the shotgun in a black Nike bag in the ceiling of the house. PW28 seized a shotgun (exh P132) together with other items from the black Nike bag. PW28 also seized a pouch together with the black Nike bag.

[20] PW28 recovered a face mask (labelled by the police as EB 6(6) and later marked in court as exh P95A) from the same black Nike bag. PW28 also recovered 16 shotgun cartridges (12 gauge) and a 12 gauge cartridge shell (*kelongsong peluru*) from the pouch seized.

THE CASE FOR THE PROSECUTION

[21] At the close of the prosecution's case, learned DPP submitted it had established a prima facie case against the appellant. Having regard to the charge, the prosecution is obliged to prove the following elements of the offence of murder as provided under ss 299 and 300 of the Penal Code:

(a) that the deceased had died as a result of the gunshot wounds he received;

(b) that the appellant had inflicted the said gunshot wounds; and

(c) that the act of the appellant in inflicting the gunshot wounds on the deceased came within the ambit of any one of the four circumstances listed in s 300(a) to (d) of the Penal Code.

[22] On the first element, the widow of the deceased, PW10 had identified the body of the deceased at the commencement of the autopsy in the presence of the police.

[23] According to the evidence of the forensic pathologist Dr Norliza bt Ibrahim (PW11), there were gunshot injuries to the deceased's head and neck.

[24] PW11 retrieved pellets and a wad from the wound track (below the right ear lobe) (exh E24) and pellets (exh E23) from the exit wounds of the deceased (left parietal scalp). The pellets (exh E23) could not undergo ballistic testing as they were too distorted.

[25] PW11 described the injuries sustained by the deceased as:

> the gunshot wound caused severe injury to the neck structures as it fractures the C3 (the third neck bone), lacerating the spinal code and lacerating the right sternocleidomastoid (muscle of the neck) muscle. As a result of the transmitted force of the passing pellets, the base of the skull was also fractured with associated subarachnoid bleeding of the base of the brain. In my opinion, the injury to neck and head lead to the deceased death.

[26] PW11 said the injuries were such that the deceased would have died instantaneously. In the opinion of PW11, the shooter had discharged the weapon at close range. She was of the opinion that the gunshot wounds were

from a shotgun. However, she qualified her opinion by stating that ballistics or other examination would be required for a definite determination of the type of firearm that was used.

[27] On the second element of whether the appellant inflicted the gunshot wounds that caused the death of the deceased, the prosecution relied on the following strands of circumstantial evidence:

(a) identification of the murder weapon;

(b) evidence of PW25;

(c) face mask; and

(d) evidence of PW20.

[28] On the identification of the murder weapon, the crime scene investigator, ASP Mohamed Nizam bin Husain (PW23), did an analysis of the trajectory of the gunshots that hit the Toyota Hilux. According to PW23, the fatal gunshots were fired at the deceased by a shooter who was in a car/vehicle that was lower in height than the Toyota Hilux.

[29] PW23 said in his report (exh P155), 'Ulasan: Hasil daripada analisis trajektori tembakan yang telah dijalankan, dipercayai penembak berada di dalam kenderaan lebih rendah daripada kenderaan simati. Contoh: kereta sedan seperti Proton Wira dan motosikal kecil'.

[30] The wad (E24) which was retrieved from the wound track was examined by Mohd Riduan bin Md Bakhir (PW17) Chemist from the Department of Chemistry Malaysia. He said in terms of size, E24 was a 12 gauge ammunition which is normally used for a shotgun. His evidence was:

> *I physically examined and compared the exhibit E24 and found that it is consistent with the wad size of 12 gauge ammunition.*
>
> *The wad is one of the components in the ammunition.* So, this E24 on page 1 of my report a piece of white colour consistent by size with the ordinary wad in 12 gauge ammunition. *This ammunition normally used for a shotgun.*

[31] Inspector Mohd Riyadh (PW21) (police ballistics expert) tested the shotgun (exh P132) and rendered a serviceability report (exh P129). PW21 testified that he examined the shotgun (exh P132). He found that the essential component parts were complete ie the shotgun had barrel, trigger, hammer and firing pin. He tested the shotgun (exh P132) using the Bullet Recovery System and found that the shotgun is serviceable.

[32] ASP Nik Mohd Norhisyam bin Nik Ismail (PW22) (Juru Analisa Siasatan Balistik, Makmal Forensik PDRM Bukit Aman) examined the shotgun (exh P132), two cartridge shells out of the 16 cartridges (police marking EB 6(3)(C) and EB6(3)(0)) that were recovered by PW28 from the ceiling of PW25's house (and which had undergone serviceability testing). He also examined a 'kelongsong peluru' (police marking EB6(3)(0)) which was found in the pouch that was recovered from PW25's house.

[33] PW22 compared the pellets recovered from the body of the deceased with the markings left behind by the firing pin on the percussion cap of the three cartridges that were used during the shotgun serviceability test. PW22 used the computerised Integrated Ballistics Identification System (IBIS) which records images of markings.

[34] PW22's opinion (exh P151) was that:

> Hasil analisa dan perbandingan antara barang kes (1) butir kelongsong peluru 12 Gauge didalam sampul surat bertanda EB6(3)(Q) dengan barang kes (2) butir kelongsong peluru 12 Gauge yang telah dijalankan ujian serviceability didalam sampul surat bertanda EB6 (6)(C) dan EB6(3)(0) dengan menggunakan barang kes Senapang patah didalam bungkusan bertanda 1 & 3 mendapati ianya mempunyai persamaan ciri-ciri individual karektoristik. Oleh yang demikian saya berpendapat ianya adalah dilepas tembak daripada satu senjatapi yang sama.

[35] Next, is what the learned judge described metaphorically as the 'thickest strand' of circumstantial evidence against the appellant, that is, the evidence of PW25. In the light of the learned judge's assessment and description of PW25 as being a key witness in the prosecution's case against the appellant, it is, we think, necessary for his evidence to be reproduced in *verbatim* such that all its strengths and infirmities and nuances can be appreciated. The appellant was known to PW25 by his nickname, 'Apek'.

[36] PW25's evidence was as follows:

> 29th March 2017
>
> *Examination-in-chief of PW25*:
>
> Q: Do you know why you are summoned today?
>
> A: Yes I know
>
> Q:Why?
>
> A: As a witness.
>
> Q: For what case?
>
> A: Murder case.
>
> Q: Do you know the name of the deceased?
>
> A: Bill Kayong.

Q: In the middle June 2016, have you been contacted by any person with regard to this case?

A: Yes

Q: By whom?

A: A man by the name of Apek.

Q: Do you know the real name of this person called Apek?

A: I do not know.

Q: Is he in this Court room today?

A: Yes

Q: Could you show which one is the Apek?

A: Witness points to 1st accused.

DPP: 1st accused identified.

Q: This Apek contacted you for what?

A: He want me to keep a shotgun.

Q: He want you to keep a shot gun, and after you have been contacted by Apek, then what happened?

A: Apek asked me to keep a shot gun and say he will contact me. And for about one-week Apek did call me asking for drinking session with him, we met at pub, when I reach there Apek ask me to go inside the pub but I didn't go inside. I ask Apek to come out. Apek went inside my car and he showed me a photo of a male person, and Apek told me he wanted this male person and actually I do not understand what is meant by Apek. And then he ask me whether I want to join him to do something and Apek did not further explain to me what is something.

Q: Can you identify the person shown by Apek if I were to show you a photograph?

A: I am not sure.

Q: Since you are not sure, I will show you a photograph and if that is not the person, can you please inform the Court?

Ranbir: I object to the question and I object to showing of any photograph because the witness has said he is not sure, which mean with any certainty he cannot identify anybody, to allow the photograph shown to him which will be leading question.

All Counsel: Adopt the same objection

DPP: My witness said he is not sure whether he is able to identify the photograph, since I am not sure too what is the photograph shown to him by Apek.

Ranbir: In a police investigation, there are ID parade and not leading the witness.

Court: The objection overruled.

Q: Refer you to P6(3). Can you identify this person in this picture?

A: I cannot identify.

Q: You said that Apek ask you to keep a shot gun, did he deliver the shot gun to you?

A: Yes.

Q: And once he delivered it to you, did you receive and keep the shotgun?

A: Yes, I did

Q: Refer you to P41(1-6). Can you recognize the object in these photos?

A: Yes, I can.

Q: What is that?

A: This is the shot gun that handed by Apek to me and ask me to keep it.

Q: When you received this item, did Apek ask you to do anything else other than keeping the shotgun?

A: Apek did ask me to go buy a sim card.

Q: Anything else?

A: And then go to shotgun testing.

Q: Where is that?

A: Somewhere nearby Bakam.

Q: If I were to show you few photographs, can you please identify what photograph is this? Refer to Exhibit P34 (1-5).

A: Picture no 3 is more clear to the place I mentioned just now.

Q: Place of what?

A: Shotgun testing.

Q: And you went there with who?

A: With Apek.

Q: Which one of you tested the Shotgun?

A: Apek was the one who tested the shotgun.

Q: When you first received the shotgun from Apek, what did you do with the shotgun, where did you store it and so on?

A: I hide the shotgun at my store in my house under the ceiling of my house.

Q: Did Apek ever come back to you and ask for the shotgun?

A: The day after we have the shotgun testing, Apek told me he will come at 5am to take the shotgun. But I only received a call from Apek around 6am, that's mean Apek only come to my house around 6am to take the shot gun.

Q: He took the shot gun at around 6am?

A: Yes, around 6 am.

Q: After Apek took the shotgun around 6am, what happened then to Apek and the shotgun?

A: After that I heard there is a murder case occurred.

Q: On the same day?

A: Yes.

Q: And then what happen?

A: Around 9am, again Apek came to my house and placed the shotgun at my house.

Q: Do you know where Apek after he left the shotgun at your house?

A: I do not know.

Q: And the shot gun, what did you do to the shotgun?

A: Again, I place the shotgun under ceiling at my house.

Q: Do you remember the date the police arrest you for this case?

A: I cannot recall.

Q: Were you arrested for this case?

A: No.

Q: Were you investigated for this case?

A: Yes.

Q: During the investigation by the police, did you tell the police anything?

A: I told the police as what I have told the Court just now.

Q: Refer you to a set photograph Exhibit P13(1-17), could you please explain to the Court if you have any information pertaining to the photograph? Look at photograph 1, where is this?

A: My house.

Q: Photo no 2?

A: The store I mentioned just now, where I place the shotgun.

Q: Photo 3 and 4, what happened at that time?

A: I point out to the police to where I placed the shotgun.

Q: And photograph no 5, whose that person in the orange attire?

A: Me.

Q: Refer to photograph 6, 7 and 8, what is that?

A: This is the bullet that handed by Apek to me and ask me to keep it.

Q: Referring you to Photograph 12, 13 and 14. what happened in these photographs?

A: I pointed out to the police to where I kept the shotgun.

Q: In photograph 15 & 16, could you please explain what happened?

A: The police opened up the cover of the shotgun and pouch that contained a bullet.

Q: Was it the same item that you recognised in P41 (1-6)?

A: Yes.

Q: Refer you to photograph 15. do you know the name of the police officer?

A: Insp Lee.

Q: Can you identify him?

A: Yes

DPP: I apply for the identification to be dispensed with.

All Counsel: No objection

Q: After the police seized all the items, what happened next?

A: The police further remand me for investigation.

Q: And the items?

A: I have no idea what happened to the items seized by them

DPP: No further question.

Ranbir: Pray for short stand down.

Court: Stand down.

Parties are as before.

Ranbir: I am still taking instruction from my client.

PW25 is reminded of his former oath.

Cross-examination of PW25 by Chua:

Q: Have you seen many shotguns in your time?

A: No.

Q: So you are not exactly familiar with shotgun

A: Yes, I am not familiar

Q: Are you able to describe the shotgun whenever this Apek allegedly handed it to you?

A: It is a shotgun.

Q: Isn't it true that whenever this Apek allegedly handed over the purported shotgun to you, it was always in the gun cover?

A: Yes.

Q: And you of course did not ever open the gun cover?

A: No.

Q: Did you keep a diary of the purported movement of the purported shotgun?

A: No.

Q: So I'll be right to suggest you have no idea as to precise date when this Apek purportedly handed over to you the purported shotgun?

A: Yes, I agree.

Q: Did you make a note as to the date when you allegedly heard that there was a murder?

A: No.

Q: In your testimony you merely heard that there was a murder case, am I right?

A: Yes.

Chua: That's all for me.

Cross-examination of PW25 by Ranbir:

Q: I noticed that you were limping into the witness box when you came to give your examination-in-chief, can you tell us why you are limping?

A: I was involved in a car accident.

Q:When did this car accident took place?

A: Sometime in 1998.

Q: Which part of your body injured in the car accident?

A: My face and leg.

Q: Which part of your leg was injured?

A: From my right thigh to my calf.

Q: When were you arrested for this case?

A: I cannot recall.

Q: I put it to you that you were arrested on 01.07.2016 at about 2am.

A: Maybe.

Q: Do you know how long you were remanded for?

A: For about 3 months.

Q: During your remand period for the first 15 days, where were you remanded?

A: Miri Central Police Station.

Q: During the remand, you did meet Apek at Miri Central Police station, is that correct?

A: No.

Q: I put it to you that on either the 14th or 15th day of your remand you briefly met Apek at Miri Central Police station.

A: Maybe.

Q: Trying recall you said maybe, so it is likely that you meet him in passing

A: Should be yes.

Q: When you meet Apek at central police station Miri you inform him that during your investigation, the police had hit the injured part of your right leg, is that correct?

A: No. I disagree.

Q: I put it to you that because you were hit repeatedly by the police on your right leg, you agree to sign a pre-prepared statement by the police.

A: I disagree

Q: I suggest to you that the information given by you during examination in chief was what the police told you to say in Court.

A: I disagree.

Q: You can't remember the month and day that you allegedly went with Apek to Bakam to test fire the alleged shotgun, do you agree?

A: Yes, I agree.

Q: I put it to you that at no point in time did you follow Apek to do the alleged test firing in Bakan.

A: I disagree.

Ranbir: I am moving to a new issue. Can we start tomorrow.

Court: Adjourned to tomorrow at 9.30AM.

Thursday, 30th March 2017@ 10:00AM Continuation of trial.

PW25 is reminded of his former oath.

Continuation of cross-examination of PW25 by Ranbir:

Q: Earlier in cross-examination you had agreed that you had no idea as to the precise date when Apek handed over to you the alleged shotgun, would I be right to suggest to you that similarly you don't even know the date and month when Apek allegedly contacted you.

A: Yes, I agree with the counsel.

Q: I put it to you that Apek never showed you any photographs of a male person, do you agree?

A: I disagree.

Q: I put it to you that you were never present during any shotgun testing, do you agree?

A: I disagree.

Q: If Apek had handed over a shotgun to you, he did so by informing you wanted to keep it before he goes a logging camp in a few days time, do you agree?

A: I disagree

Q: If Apek had collected the shotgun from you and subsequently returned it to you it was because he informed you that his plan to go to the logging camp did not materialise.

A: I think Apek tell me this.

Q: If Apek had brought you along to the test fire of the shotgun it was because he wanted to test it before he bring it to the logging camp, do you agree?

A: Apek only inform me he wants to test fire the shot gun, that's it.

Q: If Apek had asked you to keep the shotgun, he did so by informing you that he wanted to bring the shotgun to the logging camp for purpose of hunting wild animals. do you agree?

A: I do not know.

Q: You were detained under the prevention of crime act (POCA)?

A: Yes.

Q: How many days were you detained under POCA?

A: For 3 months.

Q: Are you still detained under POCA?

A: Yes.

Q: Are you detained in prison or are you released on restricted residence? **A**

A: Restricted residence.

Q: Where are you restricted to?

A: Sibu.

Q: I put it to you that your motivation to give evidence you had given in your examination-in-chief is because you made a deal with the police in exchange for you not being charged in Court for firearm possession or being detained in prison for 2 years and only be put in restricted residence for 2 years, do you agree? **B**

A: I disagree.

Ranbir: No further question **C**

Re-examination of PW25:

Q: You were asked these questions:

'Q: You can't even remember the month or day that you allegedly went with Apek to Bakam to test fire the alleged shotgun, do you agree? **D**

A: Yes, I agree.'

'Q: I put it to you that at no point of time did you follow Apek to do the alleged test firing in Bakam. **E**

A: I disagree.'

Q: Why do you disagree?

A: Because in reality I did go with Apek to Bakam for test fire.

DPP: No further question. **F**

Court: Witness released

[37] In summary, PW25's evidence was that the appellant contacted him and wanted him to hide his shotgun. Although PW25 initially said that he was contacted by the appellant in mid-June, he later agreed during cross-examination that he was not sure of the date and month when the appellant contacted him. **G**

[38] However, PW25 said that after the appellant had contacted him, the appellant asked him out for drinks and they then met at a pub, but PW25 did not want to go into the pub. **H**

[39] The appellant and PW25 got into the latter's motorcar. Whilst in the motorcar, the appellant had shown a photograph of a male person and said that he 'wanted' the male person. He said he did not understand what the appellant meant. **I**

A **[40]** According to PW25, the appellant had asked PW25 whether he wanted to 'join' him to do 'something'. He said that the appellant did not explain further.

B **[41]** PW25, however, could not identify the person when a photograph of the deceased (exh P6(3) — which was taken at the mortuary) was shown to him.

C **[42]** According to PW25, the appellant came back one evening and took the shotgun back for test-firing. This was done in a secluded place in Bakam.

D **[43]** PW25 went along with the appellant. After the test-firing in Bakam, the appellant gave the shotgun back to PW25 and told him that he would come the next day at 5am to collect the shotgun. But he only came at 6am. to take the shotgun. After that, PW25 heard that a murder had taken place. At around 9am, the appellant returned the shotgun to PW25. PW25 was arrested on 1 July 2016.

E **[44]** The third strand of circumstantial evidence was the face mask. To recapitulate, the face mask was recovered by PW28 at the same time as the recovery of the shotgun from PW25's house. Mohd Riduan (PW17), chemist, confirmed that he received it from PW28 and forwarded it to the DNA expert for analysis.

F **[45]** Zaliha Saudi (PW12), the DNA expert confirmed at the trial that she developed a DNA profile from material found on the face mask that matched the DNA developed from the blood specimen of the appellant.

G **[46]** The next strand was the evidence of Jambai ak Jali (PW20), former headman of a longhouse in Sungai Bekelit Bekenu. PW20 testified that at the material time, the deceased was assisting the residents of the long-house in Bekelit as they had an on-going land dispute with Tung Huat Pelita Niah Plantation Sdn Bhd ('Tung Huat Co').

H **[47]** PW20 said, 'Every time Bill Kayong support what I am doing, the people from the Company always threaten us until Chin (third accused) and Fitri (the appellant) enter our compound, because this people do not want to see the late Bill to support the long house folks'. He also said, 'Bill Kayong did

I explain to me the Tung Huat people always wanted to give him bribe money so that we will surrender our land to the Tung Huat Company. But we refused as Bill did not have any land there. That is why the company threatened'. Finally, PW20 said, 'The late Bill Kayong did not tell me in details about the threat that he received. He only told me that he received threat from this people'.

FINDINGS OF TRIAL JUDGE AT THE END OF PROSECUTION'S CASE

[48] On the first element of the offence of murder that the prosecution is obliged to prove, that is, that the deceased had died as a result of the gunshot wounds he received, the learned judge accepted the evidence of PW11 on the cause of death. The learned judge concluded that the prosecution had proven that the cause of death is the gunshot injuries to the head and neck of the deceased.

[49] On the second element on the question of whether the appellant inflicted the gunshot wounds that caused the death of the deceased, the prosecution had relied on circumstantial evidence. To this end, the learned judge directed himself on the law in respect of the assessment of circumstantial evidence in a criminal case before embarking on the assessment.

[50] The learned judge referred to the Federal Court decision in *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137; [2017] 3 AMR 105; [2017] AMEJ 371 in which the earlier authorities of *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22 and *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 were cited; and also *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; *Ghambhir v State of Maharastra* AIR 1982 SC 1157; *Sukhvinder Singh Naldip Singh v Public Prosecutor and another appeal* [2014] 5 CLJ 574.

[51] On the first strand of circumstantial evidence concerning the murder weapon, the learned judge accepted PW21's evidence on the serviceability of the shotgun in question principally because of PW21's expertise having conducted more than 100 ballistic analysis. PW21 had also explained that although he did not test fire the shotgun with a live round, ie with pellets, wad and gunpowder, the result will not be affected 'because it is sufficient to test because the percussion cap will trigger gun powder and to blast the wad and pellets through the barrel'. Being satisfied that PW21 had indeed examined all the component parts before test firing the shotgun and in the absence of rebuttal evidence, the learned judge saw no reason not to accept PW21's evidence.

[52] Although PW22's evidence was challenged, inter alia, on the basis that he had used his naked eyes to compare the images of the pellets with the unique markings and the markings on the percussion caps of the said three cartridges; the learned judge accepted his evidence describing his evidence as that of a 'disinterested evidence of a police expert witness'.

[53] PW22's evidence was also challenged as inadmissible on grounds of 'misidentification' of exhibits and non-identification of two of the three cartridges in court. This was rejected on the ground of irrelevancy and positive identification by the witness both in court and in his report prepared after examination of the relevant evidence.

[54] Both PW21 and PW22 did not swab the shotgun recovered to detect gunshot residue (GSR) for signs that it had been fired. Both witnesses explained that swabs for GSR were not taken as they were only tasked to perform ballistics analysis. The shotgun was however swabbed by SJN Jiffen ak Sotok (PW16) of the Forensics Unit. Science Officer Farah Ad-Din (PW18) who analysed the swab testified that she found GSR on EB6(5)(C) and upon analysis, found lead (plumbum) and antimony in the swab.

[55] Learned counsel for the appellant challenged the veracity of this evidence on ground, inter alia, that three elements of GSR: lead, antimony and barium, must be found. It seems the elements of GSR are also found in brake lining pads used in bicycles, cars and motorcycles.

[56] These contentions of the appellant were also rejected, inter alia, on the ground of relevance. In the absence of rebuttal evidence, the learned judge chose to accept the evidence of the qualified experts, PW16 and PW18.

[57] The learned judge also found the shotgun (exh P132) to be functional. The learned judge thus found that the prosecution had proven that the shotgun that was used to murder the deceased was the shotgun that was recovered from PW25's house.

[58] As for the third strand, these were the findings of the learned judge on PW25's evidence:

> *Evidence of Lau Lee Shen*
>
> [41] *The thickest strand of circumstantial evidence against the first accused was provided by Lau Lee Shen (PW25).* He is a furniture shop owner. He led the police to the discovery of the murder weapon. He strongly implicated the first accused in the killing of the deceased in this case although his evidence is circumstantial evidence only. The deceased was murdered on 21 June 2016. Lau Lee Shen could not remember the exact date but he said that he was contacted by the first accused whom he knew as 'Apek' in the middle of June of the same year. The first accused showed him a photograph of a man and said that he 'wanted' the man without explaining further. However, when shown a photograph by the prosecution, he was unable to identify the picture of the man in it. Lau Lee Shen said the first accused asked him to keep a shotgun. The first accused then gave Lau Lee Shen a shotgun which had been placed in a bag. Lau Lee Shen hid the shotgun and the bag under the ceiling of his house. The first accused also asked him to go with him to test fire the shotgun.

The pair went to a place in Bakam to test fire the shotgun.

[42] Lau Lee Shen was told that the first accused would collect the shotgun the next morning at 5am. The following morning, the first accused collected the shotgun from Lau Lee Shen around 6am. The first accused returned the shotgun to Lau Lee Shen's house about three hours later at around 9am Lau Lee Shen identified the first accused in court as 'Apek'. The only thing that Lau Lee Shen heard after that event about the first accused and the shotgun was that a murder had occurred.

[43] In my opinion, the testimony of PW25 constitutes strong circumstantial evidence to implicate the first accused in the murder of the deceased. An irresistible inference can be drawn that the first accused had a direct role in the death of the deceased. My reasons are as follows.

[44] The first accused not only left the murder weapon with PW25 about a week before the murder of the deceased but also went to test fire the gun with him in Bakam. In fact, from the testimony of PW25, it is apparent that the shotgun was tested with live rounds. Furthermore, the first accused made an appointment with PW25 to collect the gun the following morning at 5am. The first accused collected the shotgun at 6am but returned it around 9am.

The charge states that the murder occurred around 8.20am. By 8.45am, PW8 noticed that the Toyota Hilux had stopped at the traffic lights intersection in question. By 9am, the widow of the deceased heard that something had happened to her husband. In the premises, it can be reasonably deduced that the deceased was shot at the traffic lights well before 9am. It has been conclusively proven that the shotgun that the first accused had left with PW25 for safekeeping is the murder weapon.

[45] Although PW25 cannot remember the exact date, it is highly probable that the first accused returned to the former's house to collect the gun on the day of the murder of the deceased. The deceased was murdered on 21 June 2016. PW25 told the court that the first accused contacted him in the middle of June of 2016. Although during cross-examination, he was not sure about the date, he did say affirmatively during examination in chief that it was in the middle of June of 2016. That was about a week before the murder of the deceased. PW25 later heard that there was a murder. During cross-examination, PW25 said that he did not make a note as to the date he heard that there was a murder. The exchange between counsel and PW25 during cross-examination is as follows:

> Q: Did you make a note as to the date when you allegedly heard that there was a murder?
>
> A: No.
>
> Q: In your testimony you merely heard that there was a murder case, am I right?
>
> A: Yes.

In his written submission, counsel for the first accused said that the murder referred to by PW25 did not necessarily occur on the same day that the first accused collected the weapon but could have occurred on any other day. He also said that PW25 did not refer to a 'murder' in Miri and thus he could have referred to a murder anywhere in the world.

A [46] In my opinion, given the context of the testimony of PW25, he only referred to a murder that occurred in Miri and that it was related to the shotgun that the first accused had given to him for safekeeping. I reproduce below his exact words during examination in chief by the learned DPP:

B Q: After Apek took the shotgun around 6am, what happened then to Apek and the shotgun?

A: After that I heard there is a murder case occurred.

Quite obviously, PW25 was responding to the question as to what happened to the first accused and the shotgun. Assuming that the 'murder' he referred to had C occurred somewhere else in the world or on some other occasion, it would have been wholly unnecessary for him to respond to the question of the learned DPP in the manner he did. In the premises, the evidence of PW25 very strongly suggests that the first accused was involved in the murder of the deceased.

[47] I shall now consider whether the first accused could have dealt with the D shotgun for the purpose of game hunting. Counsel for the first accused suggested to PW25 that if the shotgun had been given to him at all by the first accused, it was for the purpose of hunting animals. From the photographs, the place where the shotgun was tested appears to be a secluded spot in Bakam. I should think that it is unlikely that if one had intended to go game hunting, one would be seen fit to test fire the weapon in a secluded spot beforehand. It could have been done at hunt itself. E Therefore, from the evidence of PW25, it is probable that the first accused had a more evil purpose in mind than hunting animals.

[48] Counsel for the first accused put to PW25 that he had lied in court because he had been detained by the police under the Prevention of Crime Act 1959 (POCA) and he had also been placed under restricted residence. He also suggested that F PW25 had made a bargain with the police to avoid being charged for a firearm possession offence. PW25 denied the suggestion.

In my view, there is no material to make such a suggestion. *In any event, I found him to be a credible witness. From the answers that PW25 gave during examination in chief and cross-examination, it is obvious that he was not eager to overstate the case of the* G *prosecution in any way by giving exact dates and embellishing details. It is apparent that he gave answers only insofar as his memory retained them. If he had been coached as a witness upon the striking of an unholy bargain with the police, it is likely that he would have given exact dates and more incriminating particulars. Although, demeanour is no touchstone of truth, I am satisfied that PW25 is a credible witness.* Therefore, I see no H reason to hold that he was an untruthful witness as submitted by counsel for the first accused merely because he had been detained under POCA or subjected to restricted residence.

[59] Next, was the face mask which was tendered without objection. The I identity of the face mask was however questioned by counsel for the appellant. This was the learned judge's findings on the face mask:

Face mask

[49] When the shotgun was recovered from PW25, the police found a face mask inside the shotgun bag. The face mask was sent for DNA profile analysis. Zaliha

Suadi (PW12), the DNA expert confirmed in court that she developed a DNA profile from material found on the face mask that matched the DNA profile developed from the blood specimen of the first accused. The face mask was tendered into evidence without any objection by the defence.

[50] However, the identity of the face mask was questioned by counsel for the first accused. The chemist (PW17, Mohd Riduan) received it from the investigating officer and forwarded it to the DNA expert for analysis. PW17 said that the said face mask is an 'ALPINE' brand face mask. During the trial, he agreed that the marking 'ALPINE' does not appear on the face mask. However, PW17 explained that he mistook the logo on the face mask to be of the 'ALPINE' brand. He said as follows:

> Q: You were asked about Alpine or logo by the defence counsel and you said 'no' there was no Alpine logo, you agreed to it and about the brand name Alpine and you also said 'yes' there is no brand name Alpine that you could see from the exhibit but you seemed to want to explain something to this Court?
>
> A: The Alpine actually I was referring to this face mask and now I am aware that this logo is an Alpinestar logo.

The investigating officer, PW28 testified that only one face mask was recovered from the shotgun bag. In the premises, there is no merit in the suggestion of the defence that it is possible that two face masks were recovered or there was mix up of exhibits or there was 'misidentification' of exhibits.

[51] Counsel put to the DNA expert witness (PW12) whether she knew that the first accused was forced to wear the face mask while in police custody. However, this suggestion was never put to the police witnesses including the investigating officer. Thus, there is no reason to speculate that the DNA material of the first accused got on to the face mask after his arrest.

[52] The fact that the first accused's profile was developed from material found on the face mask which was recovered from the shotgun bag corroborates the evidence of PW25. The shotgun was given to PW25 together with the bag. PW25 took it on the day in question together with the bag in which the face mask was found. Therefore, an inference can be drawn to link the first accused to the smoking gun which is the same gun that PW25 said was given to him for safekeeping.

[60] The next piece of evidence relied on was that of PW20 and these were the findings of the learned judge:

Evidence of PW20 — Jambali ak Jali

[53] PW20 (Jambali ak Jali) is the former headman of a longhouse in Sungai Bekelit Bekenu. He was a friend of the deceased. He said the deceased always supported the longhouse residents in the land dispute with a plantation company known as Tung Huat Pelita Niah Plantation. PW20 said that the deceased told him that the 'Tung Huat people' want to give him 'bribe money' to persuade the longhouse residents to surrender their land.

However, he said the 'company' threatened the deceased as he had refused the offer. PW20 said that on one occasion the first accused and third accused came to their land to threaten them. He said as follows:

A

Q: With regard to you said 'our land problem', can you please elaborate more on that?

A: Our land problem with a company called Tung Huat Pelita Niah Plantation. I myself did not enemy with anybody because these people are the ones who disturbed Bill Kayong and myself. Every time Bill Kayong support what am I doing, the people from the Company always threaten us until Chin and Fitri enter our compound, because this people do not want to see the late Bill to support the long house folks.

B

C

[54] It has been suggested by counsel that the words 'until Chin and Fitri enter our compound' in the sentence 'the people from the Company always threaten us until Chin and Fitri enter our compound', means that threats ceased after the first and third accused entered their land. For good measure, the definition of 'until' in the *Oxford Learner's Dictionary* (9th Ed) was also cited. With respect, this is not the way to understand or analyse the meaning of the words that were translated into English from another language by the court interpreter. PW20 testified in Iban. In the context of his evidence, what he meant was that the threats received by the longhouse residents culminated in first and third accused entering their compound. Otherwise, the entire passage I cited above would not make any sense.

D

[55] However, PW20 did not say anything else about the details of the threats that the deceased had received.

E

Q: About this threat received, can you elaborate more on that?

A: The Late Bill Kayong did not tell me in details about the threat that he received. He only told me that he received threat from this people.

F

Nonetheless, the evidence of PW20 links the first accused to the land dispute that the longhouse residents in Bekelit and the Tung Huat Plantation company were embroiled in. There is no evidence about the role of the first accused in the Tung Huat Plantation company but PW20 said that the first accused actually came to their land to threaten them. PW20 said that the deceased was also involved in the same dispute as he was helping the longhouse residents.

G

This strand of circumstantial evidence that links the first accused to the murder of the deceased is a weak strand but it provides motive and strengthens other strands of circumstantial evidence to link him to the death of the deceased.

H

[61] These were the conclusions of the learned judge on all the strands of circumstantial evidence:

[68] In conclusion, the prosecution has adduced strong circumstantial evidence to link the first accused to the murder of the deceased. To recapitulate, the first accused had handled the murder weapon at about the same time when the deceased was murdered. He had tested the weapon the day before the murder in a secluded spot. He came the following morning to pick up the weapon. After the weapon was returned, PW25 heard there was a murder. DNA evidence linked the first accused to the face mask found inside the shot gun bag. The former longhouse chief (PW20) said the first accused had threatened them and did not like the fact the deceased assisted longhouse residents to defend their land. *The shotgun is a powerful weapon*

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that is lethal if fired at short range. The forensic medical specialist said that death was immediate. Therefore, the shotgun must have been fired with the intention of causing death or knowledge that it will cause death under limb (c) of s 300 of the Penal Code. Although there is no evidence of the manner the shot was fired because of absence of eye-witnesses, all the above pieces of evidence if combined together, leads to the irresistible inference that it was the first accused who had shot the deceased on that fateful morning. I therefore reject the contention of counsel for the first accused that the evidence only casts mere suspicion against the first accused. I hereby call upon the first accused to enter his defence upon the said charge of murdering the deceased.

DEFENCE CASE

[62] The learned judge called for the defence after finding that the prosecution had established a prima facie case. At this point, the appellant tendered a notice of alibi dated 12 June 2017.

[63] The appellant was himself arrested on 30 June 2016 (about nine days after the murder incident). There was no evidence that when the appellant was arrested, he had mentioned anything to the police about his alibi.

[64] In defence, the appellant elected to testify on oath. In the notes of evidence he is described as 'DW1'. The appellant gave evidence on 21 May 2018, which is about *one month short of two years after the murder took place.*

[65] The evidence of the appellant (DW1) was as follows:

DW1 — MOHD FITRI BIN FAUZI

30 years old

(Affirmed and states in Bahasa Malaysia)

Examination-in-chief of DW1:

Q: When were you arrested by the police?

A: 30.6.2016

Q: At what time?

A: at 5.00 pm.

Q: Where were you working prior to 30.6.2016?

A: At KTV Blue Coast.

Q: Where is the Blue Coast KTV located?

A: At Kampung Wireless near to Madli Restaurant.

Q: In Miri?

A: Yes, Miri.

Q: What was your job at Blue Coast KTV?

A: As a bouncer.

Q: What were your working hours at the KTV?

A: I start at 9.00 pm and ends depending on when the customers leave.

Q: On average between what times when the customers leave?

A: Up until 8.00 am the next morning.

Q: When did you commence your employment at Blue Coast KTV?

A: A year before I was arrested.

Q: Did you know a person by the name Lau Lee Shen?

A: Yes.

Q: How long had you known him prior to 30.6.2016?

A: 3 years.

Q: Is this Lau Lee Shen the same person who gave evidence in Court during the prosecution stage?

A: Yes.

Q: Did you ever possess a shotgun?

A: Yes.

Q: Where did you obtain this shotgun from?

A: I bought it at Longlama town.

Q: From whom did you purchase the shotgun?

A: From a person named Tony.

Q: Did you purchase shotgun cartridges from Tony as well?

A: Yes, I did.

Q: What race and nationality is this Tony?

A: I am not sure.

Q: When did you purchase the shotgun and cartridges from Tony?

A: 5 months before I was arrested.

Q: That would be around the end of January 2016, is that correct?

A: Yes, correct.

Q: Can you tell us why you purchase the shotgun and cartridges?

A: For hunting animals.

Q: Why did you want to hunt animal?

A: Because they can be sold and be eaten.

Q: Did you ever hand over a shotgun to Lau Lee Shen?

A: Yes.

Q: When did you hand over the shotgun to Lau Lee Shen?

A: On 30.5.2016.

Q: Why did you hand over the shotgun to Lau Lee Shen?

A: Because I was afraid that I did not obtain a valid license for the shotgun.

Q: Did you ever go back and pick up the shotgun and cartridges from Lau Lee Shen?

A: Yes, I did.

Q: When did you pick up the shotgun and cartridges from Lau Lee Shen after you had handed them over to him?

A: On the evening of 3.5.2016 because I intended to go hunting.

Q: On 30.5.2016 at what time did you hand over the shotgun and cartridges to Lau Lee Shen?

A: At 8.00 am.

Q: On 30.5.2016 you handed over the shotgun and cartridges to Lau Lee Shen at 8.00 am and you took them back on the evening of the 30.5.2016, is that correct?

A: Yes.

Q: When you collected the shotgun and the cartridges from Lau Lee Shen on the evening of 30.5.2016, did you inform him about why you were taking back the shotgun and the cartridges?

A: Yes, I did tell Lau Lee Shen that I wanted to go hunting at Longlama.

Q: After taking the shotgun and the cartridges from Lau Lee Shen on the evening of 30.5.2016, did you go hunting after that?

A: Yes, I did.

Q: After going hunting, did you return the shotgun and the cartridges to Lau Lee Shen?

A: Yes.

Q: When did you return the shotgun and the cartridges to Lau Lee Shen?

A: On the morning of 31.5.2016.

Q: Between the evening of 30.5.2016 and on the morning of 31.5.2016, did you manage to go hunting?

A: Yes.

Q: Where did you go hunting?

A: road toward Longlama near logging camp.

Q: Did you manage to shoot and kill any wild animal?

A: Yes.

Q: When you came back from hunting, did you inform Lau Lee Shen about what you had done on that night?

A: Yes.

Q: What did you tell Lau Lee Shen upon your return to his house?

A: I told Lau Lee Shen that I had managed to shoot and kill a deer.

Q: Why do you remember what you did on 30.5.2016 and 31.5.2016 so well?

A: Because the next day is Gawai Day.

Q: When is Gawai Day?

A: 1.6.2016.

Q: You said you gave back the shotgun and cartridges to Lau Lee Shen on the morning of 31.5.2016, is the reason you give the shogun and cartridges back to him because you did not have a valid license to possess the said shotgun and cartridges?

A: Yes.

Ranbir: I am moving on to the Notice of Alibi. Can I tender the Notice of Alibi and have it marked as exhibit which has been duly filed and served?

DPP: No objection.

Court: Notice of Defence of Alibi dated 12.6.2017 marked as D9.

Q: On 20.6.2016 at about 9.00 pm, where were you?

A: At KTV Blue Coast.

Q: What time did you finish work?

A: At 7.00 am in the morning.

Q: At 7.00 am in the morning of 21.6.2016, is that correct?

A: Yes, correct.

Q: After work, where did you go?

A: I went to Jalan Sukma, Lorong Desa Senadin 2C. Beside the road, there were food stalls.

Q: Are the food stalls you referred to at the junction between Jalan Sukma and Lorong Desa Senadin 2C, Miri?

A: There are a lot of junctions at that area but what I can say is, it is situated beside the road going toward DPS Supermarket.

Q: What were you doing there?

A: I bought food there and sat at the coffee shop.

Q: What time did you arrive at the food stalls?

A: At 8.20 am.

Q: How did you travel to the stalls from your work place?

A: I used a car.

Q: You said you finished work at 7.00 am, at what time did you actually leave your workplace?

A: Around 7.10am.

Q: Did you go anywhere else before arriving at the food stalls?

A: Yes, I stopped at a bank.

Q: Which bank did you stop at?

A: Maybank.

Q: Which branch of Maybank?

A: Maybank near to Grand Palace Hotel.

Q: What were you doing at the bank?

A: Actually I did not go in the bank. I waited for a friend beside the road near to the bank. My friend gave me money for the deer that I managed to kill. That is the reason why I waited at the bank.

Q: Is this the deer that you had killed between the evening of 30.5.2016 and 31.5.2016?

A: Yes.

Q: How did you store this deer meat?

A: I kept it in an orange box.

Q: What type of orange box was this?

A: I am not sure about the type but it was an orange box.

Q: How big was this orange box?

A: Approximately 2' x 3' x 2'.

Q: Was this just an ordinary orange box?

A: No, it is made from fibre.

Q: What was the ordinary use of this box?

A: To put vegetables and fish.

Q: If you had killed the deer between 30.5.2016 and 31.5.2016 and handed over the meat to your friend on the morning of 21.6.2016, then the deer meat would have gone bad or rotten, is that correct?

A: What I meant was, I gave my friend the deer meat on the 31.5.2016 but only 21.6.2016 my friend gave the money to me for the deer.

Q: Are you saying that you were waiting for your friend by the roadside near Maybank after you have left your work to pick up the money that was owed to you for the sale of the deer?

A: Yes, correct.

Q: What is the name of this friend?

A: Man.

Q: Did you actually meet him on the 21.6.2016?

A: Yes, I did.

Q: At what time did you meet Man?

A: At 7.20 am.

Q: Did Man actually pay you any money?

A: Yes, he did.

Q: How much?

A: RM900.00.

Q: At what time did you leave the roadside near Maybank?

A: 7.30 am.

Q: After leaving the roadside near Maybank, did you go anywhere else before arriving at the food stalls?

A: No, I did not.

Q: About time did you arrive at the food stalls at Senadin?

A: At 8.20 am. This is because I drove slowly because the car had problem.

Q: Where is this person named Man now?

A: I do not know because I am in prison.

Q: At what time did you leave the food stalls and the coffee shop nearby?

A: Nearly 10.00 am.

Q: Where did you go after you left the food stalls and the coffee shop nearby?

A: I went back home.

Q: Where was your house?

A: At Pujut 4D, Dawai 1.

Q: Any lot number to your house?

A: Lot 593.

Q: Is there any reason why you remember the event of 21.6.2016 so well?

A: Because on the date I mentioned, I wanted to send my car for repair.

Q: During the prosecution's case, the Court was shown a face mask marked P95A. The face mask shown to the Court, had you ever seen it before it was tendered in Court?

A: Yes, I was shown the face mask when after I was arrested at the Traffic Police Station Miri.

Q: Do you remember the date you were shown of this face mask?

A: I am not sure but I can say, it was a few days after I was arrested.

Q: What was the police doing with the face mask after it was shown to you?

A: The police put the face mask on my head then lifted it off again.

Q: What were you doing when the police put the face mask on head and subsequently took it off?

A: I was handcuffed at that time then I was beaten.

Q: Were you seated at the time while handcuffed?

A: Yes.

Q: Were you handcuffed in the front or at the back?

A: From the back.

Q: How long did the face mask remain on your head?

A: More or less three minutes.

Q: Did the face mask cover your entire face when it was put on you?

A: Yes, the entire of my face.

Ranbir: I have no further questions.

DPP: I apply for 20 minutes break.

Ranbir: No objection.

Court: Stand down. 2:46PM – 21 May 2018

Court resumes at 3:10PM

Parties are as before.

DPP: For cross-examination of DW1

DW1 — MOHD FITRI BIN FAUZI

(Reminded of this former Oath)

Cross-examination of DW1:

Q: You informed the Court that you have been working at the KTV Blue Coast for one year before you were arrested, correct?

A: Yes, correct.

Q: How many days in a week do you work?

A: Full seven days.

Q: Everyday you would start work at 9.00 pm, correct?

A: Yes, correct.

Q: And you said you will leave work after the customers leave?

A: Yes, correct.

Q: You mentioned earlier roughly around 8.00 am in the morning?

A: Yes.

Q: What do you do after you leave work?

A: I went back home.

Q: Am I correct to say that your normal routine will be going straight back to your house at Pujut 4D, Dawai 1?

A: No. Sometimes I will stop to buy some food or take some food then I will go back home.

Q: You mentioned that you go hunting for animals. How often do you go hunting?

A: It depends. Sometimes I take leave for 3 days but what I can say I usually go hunting once a month.

Q: Since when do you start hunting?

A: Still in the early stage. Five months before I was arrested.

Q: You told us earlier that you shot and killed a deer, correct?

A: Correct.

Q: Do you agree with me that if you managed to shoot and kill a deer while hunting, you are a good hunter despite hunting for only five months?

A: No, I disagree.

Q: Do you agree with me that hunting requires live and moving animals?

A: No, I disagree.

Q: What animals do you hunt?

A: Deer, fox and mousedeer.

Q: Do you agree with me that the animals that you mentioned are animals that are very alert to sound and movement and move fast?

A: Yes, except the fox.

Q: Do you agree with me that because of that you also have to move fast in order to be able to shoot them?

A: No, I disagree.

Q: Do you agree with that because of the fact that those animals are very alert to sound and movement and they move fast, in order to hunt them you must have good aiming?

A: Yes, I agree.

Q: You told us that you went hunting on the 30.5.2016. You allegedly returned the shotgun that you had used for the hunting on the 31.5.2016. Do you agree with me that the hunting this time only took about less than a day?

A: Yes, I agree.

Q: Do you agree with me then that you do not need three days or to take leave from work to go hunting?

A: No, I disagree.

Q: You told us that on the morning of 21.6.2016 you went to see Man, correct?

A: Yes, correct.

PUT: That this Man does not exist.

A: I disagree.

PUT: That the transaction that you claimed had happened between you and Man near the roadside and Maybank of the Grand Palace Hotel did not take place.

A: I disagree.

Q: Do you agree with me that you had only mentioned about this person named Man today?

A: Yes.

Q: Do you agree with me that you had only mentioned about the transaction that you said between you and Man ie Man paid you RM900.00 for the deer only today?

A: I agree.

Q: You said that your car had problem and you wanted to send it for repair, correct?

A: Yes, correct.

Q: What car were you using at that time?

A: Kembara WHV6477

Q: Is that your car?

A: No.

Q: What problem did the car have?

A: It had problem with is four wheel drive shaft.

Q: What problem does it cause?

A: The car makes a certain sound that forced me to drive slowly.

Q: Do you agree with me that you were using that car to go to work at that time?

A: Yes.

Q: Do you also agree with me that you were also using the same car to return home after work?

A: Yes, I agree.

Q: You told us that after the alleged meeting with Man, you went to the food stalls and coffee shop at the junction between Jalan Sukma and Lorong Desa Senadin 2C, Senadin, correct?

A: Yes, correct.

Q: Do you agree with me that from Maybank Grand Palace Hotel to the junction Jalan Sukma and Lorong Desa Senadin 2C, Senadin is far?

A: I agree.

Q: Do you agree with me that in order to reach the food stalls and the coffee shop that you alleged that you went to, you have to exit the main road?

A: I agree.

Q: Do you agree with me that the food stalls and the coffee shop that you alleged that you went?

A: Depends, maybe once in a week. I did not count.

PUT: That your alibi of going to the coffee shop and the food stalls on the morning of 21.6.2016 is made up.

A: I disagree.

Q: If you often frequent the food stalls as you alleged, you would know that there are no coffee shops there, there are only stalls?

A: I disagree because beside the food stall there is a coffee shop quite near to the food stalls. The coffee shop is near to DPS Supermarket.

Q: If you often frequent the food stalls and the coffee shop as you alleged, you would know the name of the coffee shop and not refer it as 'the coffee shop near to DPS Supermarket'?

Chua: I believe the learned DPP only touches on the frequency of the Defendant's visit to the food stalls only and not the coffee shop.

Court: Witness to answer the question.

A: I didn't take note of the name of the coffee shop. What I know it is an Indian coffee shop beside DPS Supermarket.

PUT: That if you often frequent the food stalls and the coffee shop as you alleged, the operator or the seller of those food stalls and coffee shop would recognise you. Do you know if they would recognise you?

A: I do not know.

PUT: That you did not go to the food stalls or stay at the coffee shop until 10.00 am on the morning of the 21.6.2016 as you alleged.

A: I disagree.

Q: With the problem that you had with the car, it is inconvenient to drive from Maybank Grand Palace Hotel, exited the main road, went into the housing estates only to go to the food stalls and the coffee shop as you alleged, do you agree?

A: I disagree.

PUT: In fact, you never had gone to the coffee shop and food stalls as you alleged that morning.

A: I disagree.

PUT: That all your evidence today relating to Man, the car problem, the coffee shop and the food stalls are all false and made up.

A: I disagree.

PUT: That the only reason that you went to Senadin was to have a look out for the car of the deceased.

A: I disagree.

PUT: That the reason that you went to Senadin was to follow the movement of the deceased.

A: I disagree

Q: Do you agree with me that there is no evidence that you can show to prove that you have left work at 7.00 am on 21.6.2016.

A: I agree.

Q: Do you agree with me that there is no evidence that you show to prove the meeting between you and Man on the morning of 21.6.2016?

A: I disagree.

Q: Do you agree with me that if you did go to the food stalls and stay at the coffee shop on the morning of 21.6.2016 as you alleged, the operator of those premises can come to Court and testify to it?

A: I disagree because I am in prison.

Q: That what you said about staying at the coffee shop until 10.00 am is untrue.

A: I agree because at 10.00 am I am already at home.

Q: Do you agree with me that this is the first time you mentioned that you are already home at 10.00 am?

A: Yes.

PUT: That the timeline that you have given us today are all untrue.

A: I disagree.

PUT: That at 6.30 am on the 21.6.2016 you were already at Senadin, on the lookout for the deceased.

A: I disagree.

PUT: That at 8.00 am on the 21.6.2016 you followed the car of the deceased to the traffic light where you shot him.

A: I disagree.

PUT: That by 8.30 am on the 21.6.2016 you had contacted a friend by the name of Ah Chu where you both went to Ah Shen (PW25) ie Lau Lee Shen's house.

A: I disagree.

PUT: That when you went to Ah Shen's house on the morning of 21.6.2016, that you gave him a shotgun to keep.

A: I disagree.

Q: That morning was the only time that you had given Ah Shen a shotgun to keep.

A: I disagree.

PUT: That Lau Lee Shen has no reason to lie to this Court.

Ranbir: Lau Lee Shen was not sure of the date and there is insufficient evident to form the foundation of this question. When a question is put to a witness then there must be foundation laid for the question. Otherwise, a question can only suggest the theory.

DPP: I will rephrase my question.

PUT: That you did not give a shotgun to Lau Lee Shen on the 31.5.2016 as you alleged.

A: I disagree.

Q: Do you agree with me that Lau Lee Shen also do not possess the license for firearms and ammunition.

A: Yes, I agree.

PUT: That after you left Ah Shen's house, you sent your girlfriend Lucy and her cousin Wati to work.

A: When?

Q: On the morning of 21.6.2016?

A: No, I disagree.

PUT: That your allegation about the police had put the face mask on your head after you were arrested is untrue.

A: I disagree.

Q: Do you agree with me that the location of the food stalls and coffee shop that you mentioned in you Notice of Alibi are in fact near to the house at Senadin where you waited on the lookout for the deceased?

Ranbir: I object because this is an unfair question in that the accused has not been informed of the address or the location of the deceased's house. The question presumes that the witness is aware of the address and the location of the deceased's house.

Court: DPP have to lay foundation whether the accused know where the house is or which house.

Q: Do you know that the house of the deceased is also in Taman Desa Senadin Phase 4?

A: No, I do not know.

Q: Do you agree with me that the location of the food stalls and the coffee shop that you mentioned in your Notice of Alibi are nearby to the house at Taman Desa Senadin Phase 4 where you waited on the lookout for the deceased?

Ranbir: I object. He has already answered he does not know where the deceased house is. Therefore, this question should not be permitted in part.

Court: Objection sustained.

PUT: That your testimony today is all made up and untrue.

A: I disagree.

DPP: That is all.

Re-examination of DW1:

Q: During cross-examination you disagreed that hunting requires live and moving animals. Can you explain why you disagreed?

A: I disagreed because when I go for hunting I baited the animals with some food and during night time when you shine the torch light on the animals, their eyes will show reflection of light and the animal will not move.

Q: Can you tell the Court what time did you leave the coffee shop on 21.6.2016?

A: I left the coffee shop at 9.00 something but I am sure that it is not until 10.00 am.

Ranbir: No further questions.

Court: Witness is released.

[66] After hearing the evidence of the appellant, the learned judge made a maximum evaluation of the evidence as a whole (s 182A of the CPC) and then proceeded to find the appellant guilty as charged.

[67] In this regard, the learned judge said, 'In assessing the defence, I bear in mind that there is no burden on the part of the accused to prove his innocence. It is still the duty of the court under s 182A of the Criminal Procedure Code to consider all the evidence before it and decide whether the prosecution has proved its case beyond reasonable doubt'.

[68] Towards that end, the learned judge made the following findings:

[15] At the close of the case of the prosecution, I found that numerous strands of circumstantial evidence pointed to the guilt of the first accused in the murder of the deceased. I also found that the cumulative strength of the circumstantial evidence excludes any other possibility. One of the strands of the circumstantial evidence is in respect of the results of the ballistics examination. I erroneously held that two pellets recovered from the body of the deceased could be linked to the shotgun in question through ballistics examination. It was correctly pointed out by counsel for first accused that the pellets taken from the body were not examined by the ballistics expert. They were too severely distorted to be the subject of ballistics analysis. The learned DPP did not dispute this fact.

The police did not recover any cartridge casing from the scene of the crime as well.

[16] However, this does not mean that there is no evidence to link the first accused to the murder of the deceased. The prosecution did not rest its case merely on the results of the ballistics examination. To recapitulate, the essential points of the prosecution's evidence against the first accused which I summarized earlier when I called for defence are as follows:

(a) According to PW25, the first accused had contacted him sometime in mid-June 2016 to hand over a shotgun for safe keeping.

(b) The first accused told PW25 that he wanted 'a man' and pointed to a picture. In court, PW25 was not able to identify 'the man' in the picture. But the inference that can be drawn is that the first accused had a more sinister purpose other than hunting game with the shotgun in question as the reason he gave to PW25 was that he wanted 'a manu.

(c) The inference that the first accused had a more sinister purpose in mind is also reinforced by the fact that he asked PW25 to go with him to test fire the weapon in a secluded spot in Bakam. If the purpose was to merely hunt animals, it is unlikely that the first accused would have made elaborate preparation to test fire the weapon with cloak and dagger secrecy using live rounds in a secluded spot. He could have just gone to test the weapon by hunting game.

(d) PW25 could not remember exact dates but he said that the first accused came early morning at 6am about a week after the first accused contacted him in mid-June to collect the shotgun from him. The first accused returned the shotgun some three hours later. Later the same day, PW25 heard that there was a murder. In the context of his answer, he was referring to a murder that occurred in Miri and not anywhere else.

(e) A face mask was found in the pouch containing shotgun cartridges. It was seized together with the shotgun from the house of PW25. It was found to contain DNA material that matched the DNA profile of the first accused.

(f) PW20 (Jambali ak Jali), the former headman of the longhouse in Bekelit said the first accused came to their land together with the third accused to threaten the villagers in respect of their dispute with the Tung Huat Plantation company. PW20 said that the deceased was at that time

supporting them in their dispute with the company. Although, the deceased did not mention the first accused by name, he told PW20 that he had been receiving threats.

[17] The learned DPP also pointed out that the spent cartridge casing found in the pouch in question was for 12-gauge size ammunition. A 'wad' which is a component of a shotgun cartridge was recovered from the body of the deceased. PW17 who analysed the 'wad' said it is also for 12-gauge size ammunition.

[18] In the premises, even if there is no ballistics evidence to link the pellets recovered from the body of the deceased to the shotgun recovered from PW25, there are numerous strands of circumstantial evidence to link the shotgun and the first accused to the murder of the deceased. In the premises, I see no reason to re-visit the decision to call for the defence of the accused.

...

Whether reasonable doubt raised?

[23] The defence of the first accused was that he was not at the place and time when the deceased was shot. He said he went to the food stall area at Senadin around 8.20am. on the morning in question and stayed there until10am. He also said that he met one person by the name of 'Man' before reaching the food stall area.

[24] I agree with prosecution that his defence is one of bare denial. PW25 told the court that the first accused came to his house to collect the shotgun at around 6am on the day when PW25 heard about a murder. The first accused said he worked at the night club until 7am. However, he did not call any witnesses from his workplace to support his story. The first accused also gave no reason why PW25 should lie about the first accused coming to his house to collect the shotgun on the morning of the day when the deceased was murdered. As I said earlier, in the context of PW25's answer, 'the murder' he referred to was about a murder in Miri.

[25] Although, the first accused is in prison, he had made no attempt through his counsel or others to procure the person he referred to as 'Man' as a witness. He also agreed during cross-examination that he mentioned 'Man' for the first time in court when giving his defence. This also means that he never mentioned him to the police during investigation phase. No good reason was given by him why such crucial information was not given to the police.

Such information would have provided opportunity to the police to investigate the so-called 'Man' and find out whether he gave RM900 to the first accused. In other words, the police could have investigated the truth of his alibi defence much earlier.

[26] The first accused said during cross-examination that he frequented the food stall area about once a week. However, he was unable to recall the name of the coffee shop where he had stopped to have food and drinks for a period of almost two hours on the morning of the murder. He was only able to describe it as an 'Indian coffee shop' beside DPS Supermarket. The only reason given for not calling the stall owner or anyone else to corroborate his story was that because he had been remanded. No reason was given why no effort was expended through others to call the stall owner or anyone else to corroborate his story.

[27] Although under s 402A of the Criminal Procedure Code, a notice of alibi can be given at any time, in the instant case, the notice was only given after the last

witness for the prosecution testified. Furthermore, the notice is vague. The notice says that the first accused was at 'the food stalls by the road at the junction between Jalan Sukma and Lorong Desa Senadin 2C, Senadin'.

[28] For all the above reasons, I find that the alibi defence is a sham. The accused had been deliberately imprecise about his alibi. He did not tell the police during the investigation phase that he met 'Man' at the Maybank area near the Grand Palace Hotel which is far away from his house in Pujut. On the other hand, the deceased lived at Taman Desa Senadin Phase 4 which is not far away from the said food stalls. The first accused did not give names of anyone he met during the two hours he spent at the coffee shop in question. It is an alibi bereft of details and which was kept up his sleeve until the case for the prosecution was almost completed (see *Alcontra a/l Ambros Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705). Thus, the conclusion that it was a recent invention cannot be avoided.

[29] I shall now give further consideration to the dates mentioned by the first accused and PW25 about the safe keeping of the shotgun. PW25 candidly admitted that he could not remember the exact dates in question. Initially, PW25 said that the first accused contacted him sometime in mid-June of 2016 and asked him to keep a shotgun for him.

Only about a week later, the shotgun was given to PW25 by the first accused. The deceased was murdered on 21 June 2016. However, as I said earlier PW25 was not sure of the dates in question as he agreed during cross-examination that he cannot remember the date or the month in question.

[30] On the other hand, the first accused gave a specific date. He allegedly took back his shotgun from PW25 on the evening of 30 May 2016 and returned it on the morning of 31 May 2016. He said he could remember the date because the following day is the Gawai festival day which is a public holiday in Sarawak.

[31] However, if the assertion of the first accused is true, PW25 would also have recalled the dates in question because of the Gawai festival day. PW25 was not unemployed as he gave his occupation as working in a 'Furniture Shop' when taking his oath as a witness. Thus, PW25 would also have remembered a significant festival day that is a public holiday throughout Sarawak. Furthermore, PW25 did not say that the accused took the shotgun in the evening and returned it in the morning. He said that it was taken at 6.00 am on a particular morning and returned three hours later. On the same day, he heard that a murder had taken place. As I said earlier, the murder he referred to in the context of his answer was a murder committed in Miri. The investigating officer testified that the deceased was murdered on 21 June 2016. In the premises, the initial statement by PW25 that the first accused contacted him in mid-June is more probable and plausible. I had already given reasons earlier that PW25 appeared to be a credible and a truthful witness. He has nothing to gain by lying in court. Furthermore, he is not an accomplice in this case.

[32] I have also considered the evidence of the first accused that he was made to wear the face mask by the police for about three minutes after he was arrested. The argument is that the DNA material of the accused could have got attached to the face mask during this time. I find no merit in this suggestion and must conclude that it is a fabrication or an afterthought as it *was never suggested to the police witnesses who were involved in the collection of evidence.* My reasons are as follows.

A [33] *When the police witnesses testified in respect of collection of various items including the face mask from which forensic evidence was extracted, no suggestion of deliberate tampering or contamination was put to those witnesses by counsel for the first accused.* Counsel for the first accused only put to the DNA expert (PW12) that the police forced his client to wear the face mask. If it were true, it is a serious allegation as it B is tantamount to accusing the police of deliberately contaminating evidence with the aim of subverting the course of justice.

[34] Counsel for the first accused submitted that the prosecution had the requisite notice because the suggestion was if fact put to the DNA expert and therefore the investigating officer should have clarified the matter. In my opinion, there is no duty C on the part of the investigating officer or other police witnesses to gratuitously clarify a suggestion made to a civilian witness who was not involved in the collection of evidence. *If there was merit in the suggestion, counsel for the first accused could have put the suggestion in question directly to the relevant police officers who had custody of the first accused or to the investigating officer instead of raising it in the submissions at the* D *close of the case of the prosecution and at the end of the case for the defence.*

[35] In conclusion, I find that the first accused failed to raise a reasonable doubt on the case for the prosecution. I disbelieve his defence of bare denial and defence of alibi for the reasons given above. I have also considered whether his evidence, although I disbelieve it, raises a doubt on the whole of the case for the prosecution. E I find that it does not.

The circumstantial evidence tendered by the prosecution irresistibly proved that it was the first accused who murdered the deceased as stated in the charge and they do not point to any other explanation. (Emphasis added.)

F **[69]** Ultimately, the learned judge found that the prosecution had established its case beyond reasonable doubt.

SUBMISSIONS ON BEHALF OF THE APPELLANT

G **[70]** Before us, learned counsel for the appellant challenged the four strands of circumstantial evidence relied on by the prosecution and accepted by the learned judge. The first strand of circumstantial evidence was the so-called connection between the pellets that were recovered from the deceased's body and the shotgun.

H

[71] In this regard, it is true that the learned judge had erroneously concluded that PW22 had determined via ballistics testing that the pellets came from the same shotgun (exh P132) which was recovered through PW25's revelation to the police investigators:

I [25] Lau Lee Shen (PW25) led police to the discovery of a shotgun which was hidden below the ceiling of his house. The pallets recovered during the autopsy of the deceased were sent to the police ballistics expert (ASP Nik Mohd Norhsyam Bin Nik Ismail, PW22) for comparison. He said that in his opinion, the pallets were fired from the same shotgun. Counsel for the first accused challenged his evidence.'

[26] The ballistics expert (PW22) outlined the method he employed in his witness statement under s 402B of the Criminal Procedure Code. He compared the pallets recovered from the body of the Deceased with the markings left behind by the firing pin on the percussion cap of the three cartridges that were used during the shotgun serviceability test.

He used the computerised Integrated Ballistics Identification System (IBIS) which records images of markings.

[40] For all the above reasons, I find that the prosecution has proven that the shotgun that was used to murder the Deceased in this case is the shotgun that was recovered from the house of Lau Lee Shen (PW25). The prosecution has also proven that the weapon was functional ...

[72] This has since been conceded by the learned judge to be erroneous (see para 15 of the judgment of the learned judge). The appellant maintains that the learned judge's error in this regard is monumental as it influenced and prejudiced the entire assessment of the circumstantial evidence.

[73] At any rate, the remaining strands of circumstantial evidence against the appellant are:

(a) timeline as evinced from what has been described as 'the thickest' circumstantial evidence given by PW25;

(b) the appellant's DNA on the facemask; and

(c) threat by appellant as testified by PW20.

[74] Counsel for the appellant meticulously trawled through the evidence of PW25 and submitted that the learned judge's findings on the timelines are completely wrong. Before us, counsel for the appellant submitted as follows. Counsel said that there is insufficient credible evidence adduced by the prosecution to prove that the appellant had caused the death of the deceased and as such there was no prima facie case established which required the appellant to be called upon to enter his defence.

[75] It was submitted that even if the learned judge had rightfully called upon the appellant to enter his defence then the evidence led through the appellant was sufficient to raise a reasonable doubt.

[76] The only evidence which was adduced against the appellant is circumstantial evidence and there is no direct evidence. The question is whether the circumstantial evidence adduced by the prosecution was sufficient to establish a prima facie case against the appellant and whether the evidence as a whole, including the defence that was advanced by the appellant had established beyond reasonable doubt that it was the appellant who had used the

A shotgun (exh P132) and was responsible for the murder of the deceased on 21 June 2016. Counsel referred to the following cases which dealt with the requisite standard of proof where the only available evidence is circumstantial evidence.

B **[77]** First, is the case of *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22 where Thompson CJ formulated the principle in these words:

> It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

C

D **[78]** The next case is *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at p 279 where Lord Cairns stated the principle as follows:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner.
>
> E But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
>
> F In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person, you find in your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely on circumstantial evidence.

G

[79] Counsel also referred to the Court of Appeal's decision in *Sukhvinder Singh Naldip Singh v Public Prosecutor and another appeal* [2014] 5 CLJ 574 (CA). In that case, the Court of Appeal referred to *Ghambhir v State of* H *Maharastra* AIR 1982 SC 1157, and stated the principle thus:

> When a case rests upon circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, *must be cogently and firmly established*; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the I conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

[80] It was submitted for the appellant that when arrving at the inferences drawn and conclusions reached, the learned judge had departed from the tests laid down in the above-mentioned authorities and wrongly evaluated the evidence adduced through the prosecution witnesses and the evidence of the appellant (after defence was called).

[81] Counsel emphasised that a perusal of the evidence of ASP Nik Mohd Norhsyam bin Nik Ismail (PW22) will show that the shotgun pellets during the autopsy were not sent to the police ballistics expert (PW22) for comparison and PW22 did not opine that the pallets were fired from the same shotgun.

[82] Further, PW22 did not compare the pellets recovered from the body of the deceased with the markings left behind by the firing pin on the percussion cap of the three cartridges that were used during the shotgun serviceability test.

[83] PW22 did not use the computerised Integrated Ballistics Identification System (IBIS) which records images of markings for the purpose of making such a comparison. Neither did any other witness give evidence to support the above-mentioned conclusions.

[84] Counsel said that the learned judge had used the conclusions with regard to the pellets emanating from the shotgun as one of the reasons to call upon the appellant to enter his defence.

[85] Hence, counsel said that the conclusions referred to by the learned judge at the end of the prosecution's case, do not even constitute a strand of evidence which could be taken into account when evaluating the remaining circumstantial evidence to see if the tests stated in the above-mentioned authorities have been satisfied.

[86] Counsel contended that it should be removed from the equation in its totality save for the fact that it seriously and erroneously affected the evaluation of the remaining circumstantial evidence by the learned judge to such an extent that the learned judge had (wrongly) concluded that the remaining circumstantial evidence was still capable of convicting the appellant.

[87] Next, counsel criticized the manner in which the learned judge evaluated the evidence of PW25. He referred to paras [41]–[47] of the grounds of judgment (at the end of the prosecution's case) and submitted that the evidence adduced from PW25 does not support the inferences and conclusions reached by the learned judge. Counsel for the appellant said that whilst there is no doubt that the deceased was murdered on 21 June 2016 there is insufficient proof that the appellant was the person who did it.

[88] On the topic of 'timelines', counsel said that PW25's evidence was that he was contacted by the appellant in the middle of June 2016. And in this context 'contact' means that were communications between the appellant and PW25 and that is all. It does not mean that the shotgun was handed over by the appellant to PW25 for the first time in the middle of June 2016.

[89] Continuing with his submissions, counsel said that if the evidence-in-chief of PW25 is perused carefully, it can be seen that PW25 never stated when he received the shotgun from the appellant (there is no time and date or month referred to).

[90] The first contact (communication) according to PW25 was in the middle of June 2016. This was when the appellant only asked PW25 to keep a shotgun and did not actually hand over the shotgun. Then the appellant said he will contact PW25.

[91] Only about a week after middle of June 2016 did the appellant contact PW25 and asked him for a drinking session and they met at a pub where the appellant asked PW25 to go inside the pub but PW25 did not and instead they met inside PW25's car where the appellant showed PW25 a photo of a man that PW25 could not identify.

[92] PW25 said the appellant 'wanted' the man but the former did not understand what the appellant meant by that. During this time also, the appellant apparently asked PW25 whether PW25 wanted to do something with him, without any further explanation. As such, it was contended by counsel that the timeline is or should be as follows:

(a) middle of June 2016 (estimated to be between 14 to 16 June 2016). First contact;

(b) second contact, (about a week later, estimated to be between 21 till 23 June 2016 (conversation in PW25's car). Shotgun still not delivered to PW25 yet; and

(c) Deceased died on 21 June 2016.

[93] Counsel said that from the above timeline it can be seen that the deceased died before any shotgun was handed over by the appellant to PW25. Only sometime after the second contact (estimated to be between 21 and 23 June 2016) was the shotgun delivered by the appellant to PW25.

[94] Counsel said that the date and time of delivery of the shotgun by the appellant to PW25 remains unspecified but from the narrative of PW25, *it must have been after the deceased had died on 21 June 2016.* This is because it was

only sometime after the second contact that delivery of the shotgun had taken place and even then it was sometime after the test firing of the shotgun taken place in Bakam.

[95] The date of receiving and storing of the shotgun by PW25 cannot be the same day as the test firing because PW25 stated first, he received the shotgun then he went to buy a sim card and it was only after that, that the test firing took place. Later on, in his evidence-in-chief, PW25 stated that when he first received the shotgun, he had hidden it under the ceiling.

[96] Counsel said that all this must have been after the day the deceased had died. He also said that at the very least, from the narrative in the examination-in-chief of PW25, those events happened either on 21 June 2016 or shortly after 21 June 2016 even if the said events happened on the same day. This is because there was no precise date and time given. And only after the day of the shotgun test firing did the appellant take the shotgun gun back at about 6am and return it again to PW25 at about 9am

[97] This fact *makes the timeline go beyond 21 June 2016* and as such the murder that PW25 heard about must be some other murder and not that of the deceased. Further, PW25 did agree that he thought that the appellant told him that his plan to go hunting did not materialise.

[98] Next, counsel said that the finding at para 68 — end of prosecution's case was erroneous. At para 68, the learned judge stated that 'the first accused had handled the murder weapon at about the same time when the deceased was murdered. He had tested the weapon the day before the murder in a secluded spot. He came the following morning to pick up the weapon. After the weapon was returned, PW25 heard there was a murder'.

[99] Counsel submitted that there is no evidence to support the finding of the learned judge that, 'After the weapon was returned, PW25 heard there was a murder'. This is because the evidence shows that PW25 heard about a murder after the shotgun was collected by the appellant and before the appellant returned the shotgun at about 9am. The evidence can be seen at Vol 2B at pp 395 and 396 where it is stated as follows:

Q: He took the shot gun at around 6 am?

A: Yes around 6 am.

Q: After Apek took the shot gun around 6 am, what happened then to Apek and the shotgun?

A: After that I heard there is a murder case occurred.

Q: On the same day?

A: Yes.

Q: And what happened then?

A: Around 9 am, again Apek came to my house and place the shotgun at my house.

[100] It was submitted that if the alleged murder case that PW25 heard of had anything to do with the shotgun that was taken and returned by the appellant then surely PW25 would have questioned the appellant especially since the learned judge had stated that PW25 was not an accomplice to the murder of the deceased.

[101] Further, as for 'motive', there is no evidence that PW20 stated that the appellant did not like the fact the deceased assisted longhouse residents as stated by the learned judge.

[102] In so far as the test firing of the shotgun is concerned, the learned judge made findings that the appellant could have brought the shotgun with him when he went hunting rather than test firing it in a secluded spot in Bakam. It was submitted that the said findings ought not to be made because it is equally likely for the appellant to test fire the shot gun at a secluded spot before going hunting.

[103] Counsel said that this is because the said shotgun was an unlicensed shotgun and the appellant had no license to carry the same. That was why the appellant had to test fire the shotgun in a secluded place before going hunting.

[104] The appellant could not go around carrying the shotgun and test fire it in public because it was illegal for him to do so and he would have risked being caught by the police.

[105] The appellant would want to test fire the shotgun in a secluded place before going to the jungle to hunt because it would have been a wasted effort for him to go to the jungle to hunt and then only to discover that the shotgun did not work. It is obvious that the reason the appellant asked PW25 to hide the shotgun was because it was an unlicensed shotgun.

[106] It was submitted for the appellant that even if PW25 did accompany the former to Bakam there was nothing sinister because the test firing was done to ensure that the weapon was serviceable as the appellant wanted to go hunting for animals. According to PW25 the appellant may have mentioned that he wanted to go to the logging camp. In the circumstances, it was submitted that the circumstantial evidence did not meet the criteria of the tests laid out in the above-mentioned authorities to establish a prima facie case.

[107] In so far as the conclusions and findings of the learned judge at the close of the defence case counsel submitted as follows. The learned judge had contradicted himself on when the appellant contacted PW25: about a week before the murder of the deceased as opposed to the appellant leaving the shotgun with PW25 about a week before the murder.

[108] The learned judge had clearly misdirected himself on the facts of the case which led the learned judge's findings becoming distorted in as far as the timeline of events was concerned.

[109] Counsel also submitted that the learned judge misconstrued the events. The incident about the unidentified 'man' that PW25 referred to did not happen on the day the appellant collected the shotgun at 6am. The picture of the unidentified man that the appellant 'wanted' happened at the meeting in PW25's car outside a pub whereas the incident about the appellant mentioning to PW25 about hunting happened on the day the appellant collected and returned the shotgun.

[110] These two events happened on different days and should not be associated with each other. Even if the two events were to be associated with each other, the timeline as submitted above would disassociate it from any link with the murder of the deceased.

[111] According to counsel, the learned judge had repeated the error when previously he had stated that the appellant left the shotgun about a week before the murder and later the learned judge stated that the contact was about a week before the murder.

[112] Once again, the learned judge stated that PW25 had said later there was a murder, when in actual fact PW25 stated that he heard the murder happened between the taking and the return of the shotgun by the appellant. Again, it was submitted that the timeline issues dispel the findings and conclusions of the learned judge.

[113] Counsel said that it was immaterial that the face mask was found to have contained the DNA of the appellant because the timeline shows that the events took place after the murder of the deceased.

[114] Counsel also referred to the spent cartridge casing which was found in the pouch, which was for 12-gauge size ammunition and the recovery of a 'wad' (from the wound track of the deceased) which is the component of a shotgun cartridge and to PW17's testimony that the 'wad' is also for 12-gauge ammunition. Counsel submitted that these may be relevant if the timelines

matched that of the murder of the deceased but it does not. He said that in any event there are many shotguns with 12-gauge ammunition, and by itself does not prove anything.

[115] In his defence, the appellant stated that he took back the shotgun from PW25 on the evening of 30 May 2016 and returned it in the morning of 31 May 2016. The appellant could remember the same because the next day was the Gawai festival which is a public holiday in Sarawak.

[116] It was submitted that the evidence of the appellant is more preferable than that of PW25 because he has a reason to remember the date he took and returned the shotgun to PW25 whereas PW25 does not. Further, the appellant's version about going hunting with the shotgun carries weight because it is corroborated by PW25 in that PW25 thought that he could remember the appellant talking about hunting.

[117] As such, it was submitted that based on the abovementioned theory on timelines, the learned judge misdirected himself when equating the time of the first contact (communications) as being the time of first delivery of the shotgun by the appellant to PW25.

[118] Consequently, all the learned judge's findings were based on this misconstrued timeline to fit the alleged actions of the appellant into the date and time the deceased was murdered. From this fact alone it can be seen that the shotgun recovered from PW25's custody (exh P132) was not the murder weapon.

[119] It was submitted that from the cross-examination of PW25, the timeline could not be established because PW25 could not remember the timeline as to when (month and day) the first contact happened, the month and day the test firing took place and the time the shotgun was handed over.

[120] There was also no explanation or clarification given by PW25 in his re-examination. It is therefore submitted that it is clear that there was no basis for the learned judge to start calculating the timeline from the middle of June 2016 and arriving at his subsequent conclusions and findings.

[121] Counsel said that, if both versions are possible ie the version as explained by the learned judge and the version submitted on behalf of the appellant, then the version most favourable to the appellant must be adopted.

[122] As such, it was submitted that the second so called strand of evidence (timeline) is also lacking and can hardly be described as satisfying the legal

threshold for reliance on circumstantial evidence because the evidence presented by the prosecution does not cogently and firmly establish and does not have a definite tendency to unerringly point towards guilt of the appellant.

[123] Counsel said that if his interpretation of the timeline of events is wrong then the evidence given by PW25 is in any event, too vague to connect the dots to implicate the appellant with the death of the deceased in the manner that the learned judge did.

[124] It was emphasised that when PW25 heard that there was a murder, he did not state the date and time he heard about it. PW25 did not state where the alleged murder occurred and neither did he state the source as to what he heard, namely where and how the murder occurred ie with what weapon the alleged murder was committed and the location it was committed.

[125] Counsel said that, at least if PW25 had stated that the murder was committed with a shotgun then PW25's own suspicions would have been raised to such an extent that he would have questioned the appellant upon the shotgun being returned to him at about 9am. PW25 did not say anything to the appellant when the latter returned the shotgun to PW25 on the day that he claimed that he had heard that a murder had taken place.

[126] It was suggested that PW25's 'motivation' to testify against the appellant was because he had been detained under the Prevention of Crimes Act 1959 ('the POCA') and had done a 'deal' with the police.

[127] Next, as far as the face mask (exh P95A) is concerned, counsel said that this is the third strand of evidence which was relied upon by the prosecution. The face mask was apparently found in the shot gun bag recovered from PW25.

[128] It is submitted that even if the face mask was found in the gun bag to have the DNA of the appellant, the timeline explained above do not support or corroborate any suggestion that the face mask was used in any way in the killing of the deceased.

[129] The fourth strand of evidence is that of PW20 (Jambli ak Jali). The learned judge's conclusions are at paras [53], [54] and [68] of the grounds of judgment at the end of the prosecution's case. In arriving at his conclusions and findings pertaining to the evidence given by PW20, the learned judge quoted the following evidence of PW20 Vol 2B, pp 291 and 292:

> Q: With regard to you said 'our land problem', can you please elaborate more on that?

A: Our land problem with a company called Tung Huat Pelita Niah Plantation. I myself did not enemy with anybody because these people are the ones who disturb Bill Kayong and myself. Every time Bill Kayong support what I am doing, the people from the company always threaten us until Chin and Fitri enter our compound, because this people do not want to support the long house folks.

Q: About this threat received, can you elaborate more on that?

A: The late Bill Kayong, did not tell me the details about the threat that he received. He only told me that he received threat from this people.

[130] It was submitted that the learned judge erred in evaluating the evidence of PW20. This is because the learned judge had clearly relied on hearsay evidence given by PW20. This occurred when the learned judge stated, 'PW20 said that the deceased told him that 'Tung Huat people' want to give him 'bribe money' to persuade the longhouse residents to surrender their land'.

[131] It occurred again when PW20 stated that the deceased did not tell him the details about the threat that he received and only told him that he received threats from people. This makes the evidence of PW20 inadmissible because it is hearsay evidence. There is also no evidence as to when the deceased gave PW20 such information.

[132] At most, such information can only go towards the fact that it was said to PW20 by the deceased and not towards the truth of the same. In as far as the alleged presence of the appellant is concerned in the compound of the longhouse, it was submitted that no date was given as to when the appellant was present and as such the appellant was not in a position to prove that he was never there.

[133] There is no connection established between the appellant and Tung Huat Co. As such, there was no motive established through evidence on the part of the appellant to threaten the deceased or PW20. Therefore, the evidence of PW20 does not even constitute a weak strand.

[134] Counsel said that in assessing the credibility of PW20, the learned judge did not take into account the cross-examination of PW20 where High Court cases OS No MYY-24–5/2 of 2016; MR-2–21 of 2011 and Court of Appeal Civil Appeal No Q-01-94–03 of 2014 were referred to the learned judge.

[135] Counsel said that judicial notice of the decisions in the said cases ought to have been taken whereby it can be seen that despite losing every single case against Tung Huat Co, PW20 kept on suing Tung Huat Co; that PW20 disagreed to the same claiming that he did not know because no one told him the outcome of the cases including Mr Leslie Linton, PW20's advocate.

[136] In this regard, it was submitted for the appellant that if the learned judge had assessed this evidence, he would have found that PW20 was not a credible witness. As such this strand of evidence did not provide motive to link the appellant to the murder of the deceased. The learned judge said that PW20's evidence provided the necessary motive for the killing of the deceased, whilst at the same time acknowledging that PW20's testimony constituted a strand of circumstantial evidence which, by itself, was 'weak'.

PROSECUTION'S SUBMISSIONS

[137] In response, the learned DPP submitted that the focus should not be on the dates, but rather the time when the events, as narrated by PW25, had occurred. This evidence should then be examined holistically together with all the other evidence attendant upon the case. The DPP said that there was no evidence that the murder which PW25 had heard of before the shotgun was returned by the appellant, was a murder which happened outside Miri. In the absence of such challenge, given the context of the testimony of PW25, he could only have been referring to a murder in Miri, and the murder was related to the shotgun that the appellant asked him to keep for him.

[138] The DPP submitted that in the absence of any evidence that there were other murder cases related to shotgun which occurred at the same time of the murder of the deceased, circumstantially, the fact remains that evidence of PW25 is related to the murder of the deceased in this case.

[139] As for PW25's credibility, it was submitted that PW25 spoke the truth and was not lying. PW25 did not try to help the prosecution by giving exact dates and embellishing details. He gave answers only insofar as his memory retained them.

[140] If, as suggested by the appellant, PW25 struck an unholy bargain with the police and had been coached, he would have given exact dates and more incriminating particulars. The DPP said that PW25 had no reason to lie, especially since he was not an accomplice to the murder.

[141] Thus, despite the attempt to discredit PW25 by suggesting that he had lied in court because he had been detained by the police under the Prevention of Crime Act 1959 ('the POCA') and he had also been placed under restricted residence and that he had made a bargain with the police to avoid being charged for a firearm possession offence, the learned judge found him to be a credible witness.

[142] The DPP also submitted that the other physical evidence which have to be considered as part of the strands of evidence are, the wad which was retrieved

from the wound track, the shot-gun cartridges recovered from PW25's ceiling and the cartridge casing which was found in the pouch which contained the cartridges.

[143] PW17 physically examined and compared the wad which was recovered from the wound track (exh E24) and found that it was consistent with the wad size of 12 gauge ammunition. He said that the wad is one of the components in the ammunition for a shotgun.

[144] PW28 recovered from PW25's house a shotgun (exh P132) and 16 live bullets (exh P134A to 149A). PW22 conducted the firing test on two live bullets out of 16 that were recovered and it matched with exh E24 in terms of size, viz.12 gauge ammunition, which is normally used for a shotgun.

[145] PW22 examined the cartridge shell which was found in the pouch and the shells from the two live cartridges which had undergone serviceability testing and he found that they were all consistent with 12 gauge ammunition and had been fired from the same weapon.

[146] Lastly, the face-mask. The face-mask which was recovered from the bag in which the shot-gun was kept, contained the appellant's DNA

[147] At the trial, it was established through scientific evidence that the appellant's DNA was found on the mask (exh P95A). In her report, Puan Zaliha bt Suadi-Scientific Officer from Jabatan Kimia Malaysia, Kementerian Sains Teknologi dan lnovasi) (PW12) said: 'The DNA profile developed from tape-lifts of face mask 'EB 6(6)' distinguished a male contributory source with a DNA profiling specimen 'EB 1(14)' (labelled 'Mohamad Fitri Pauzi') indicating that the DNA identification originated from the same source'.

[148] The appellant purported to explain the presence of his DNA on the mask by stating that whilst in police custody, the mask was placed over his face for about three minutes. He claimed that when the face mask was placed over his face, he was handcuffed behind his back and.

[149] During cross-examination, it was put to PW12 that: 'were you being made aware that the first defendant Mohamad Fitri Pauzi was *forced to put on P95A when he was in police custody?'*.

[150] It is no surprise that PW12 responded: 'I do not know'. It is only logical that she would not know one way or the other as to how the appellant's DNA got onto the face-mask.

[151] It is highly significant that the same question was not also put to PW 13 (the arresting officer) or to the other police witnesses, including in particular, the investigating officer, PW28.

[152] The appellant's notice of alibi was an afterthought and a recent invention. It was bereft of details and there were no witnesses to corroborate or back up the appellant's account of his whereabouts on 21 June 2016.

[153] Based on PW25's testimony and the test firing of the shotgun in Bakam the day before and the timelines pertaining to the appellant collecting the shotgun the next day (on 21 June 2016) at 6am and returning it at 9am that day and the occurrence of a 'murder' which PW25 had heard of (before the shotgun was returned), the appellant had the 'opportunity' to commit the murder.

[154] Based on PW20's evidence, there was a motive for the appellant to murder the deceased, albeit a weak strand. The motive for the killing was because the deceased was helping the longhouse residents in the Bekelit area in their land dispute with Tung Huat Co.

OUR DECISION

[155] We have examined the records very carefully and it is clear that the learned judge believed the prosecution's witnesses, particularly, PW25 and PW20. Although the learned judge did not expressly articulate that he found PW20 to be credible, we are of the view that looking at the learned judge's approach to and his assessment of PW20's evidence on the threats by the appellant and the third accused and the deceased's intimation to PW20 that he (the deceased) had been threatened by the people from Tung Huat Co, it is clear that the learned judge believed PW20's evidence on these matters.

[156] As to the topic of motive, it should also be noted that PW19 had said that the deceased was assisting the natives in the long-house in Bekelit in their dispute with Tung Huat Co and the deceased was 'fearful' for his life because of his involvement in the land dispute.

[157] The fact that the learned judge did not mention anything about PW20's credibility or his answers about the litigation concerning Tung Huat Co does not in our view render him ipso facto a witness who is lacking in credibility.

[158] There was in our view, a series of circumstances and coincidences which when considered and evaluated in the aggregate (and not in isolation) points conclusively and irresistibly to the guilt of the appellant. Of course, the appellant has denied any involvement in the murder.

[159] It is said that the prosecution has not established any animosity between the appellant and the deceased, to give rise to a possible motive. It is also contended that the appellant had put forward a plausible defence of alibi.

[160] The appellant also contends that the learned judge got the timelines completely wrong and compounded by the fact that PW25 could not remember the exact date and month when the appellant first got in touch with him and handed over the shotgun to be hidden. PW25 said that the shotgun was taken at 6am on a particular morning and returned three hours later. On the same day, he heard a murder had taken place. The learned judge was satisfied that the murder which PW25 referred to in the context of his answer, was a murder committed in Miri.

[161] The finding of the learned judge was that there is no evidence of any other murder in Miri on 21 June 2016. PW25's answer that on the day when the appellant collected the shotgun and returned it three hours later, he had heard that a murder had taken place, can only and must logically be referenced to the murder of the deceased as per the charge.

[162] We are satisfied that based on the evidence that was adduced during the prosecution's case, and notwithstanding the absence of a direct forensic (ballistic) link between the appellant's shotgun and the pellets that were retrieved from the wound track on the right side of the neck of the deceased and from the left parietal scalp, a prima case was established to implicate the appellant to the murder of the deceased on 21 June 2016 at around 8.20am.

[163] As such, the learned judge was correct as a matter of law in calling upon the appellant to enter his defence. Thereafter, the appellant testified on his own behalf. Ultimately, the learned judge reviewed and re-evaluated the entire evidence (at the end of the trial) and concluded that the prosecution had established its case beyond a reasonable doubt. The learned judge was satisfied that the appellant was responsible for the fatal shooting of the deceased as per the charge. The main plank of the appellant's attack in the appeal before us was the timeline. It was emphasised quite trenchantly that the learned judge got all the timelines wrong and that is compounded by the fact that PW25 was unsure of the dates and the month when the appellant first contacted him and handed the shotgun for safekeeping, took it back, and returned it.

[164] For his part, the appellant was very clear when he testified on 31 May 2018 that he gave the shotgun to PW25 on 30 May 2016 (morning), took it back on the same day (30 May 2016) in the evening for purpose of hunting animals, and then returned the weapon to PW25 on 31 May 2016. He said he remembered all this very clearly because the next day, 1 June 2016 was the *Gawai* festival which was a public holiday in the State of Sarawak.

[165] The appellant said he shot a deer and sold the deer meat to a person called 'Man'. What is interesting about the appellant's narrative as to the date and time of the handing over of the shotgun and subsequent retrieval (for deer hunting) is that this was raised for the first time in court during the appellant's testimony in the sense that it was being revealed for the first time. I shall refer to this as the 'transaction'.

[166] Whilst it is true that during examination in chief, PW25 agreed to the DPP's (leading) question that the appellant got in touch with him in mid-June 2016, it was never put to PW25 during cross-examination that the transaction between the appellant and PW25 with regard to the handing over of the shotgun and the return of the same took place on 30–31 May 2016.

[167] Of course, it is not the burden of the appellant to disprove the prosecution's case or to prove his innocence. In fact, the appellant can even fold his hands and watch the prosecution's case unfold or collapse on its own inherent weakness, if any.

[168] But, if a witness for the prosecution maintains that the transaction took place on a particular date, and if the accused takes the position that it occurred on another date, then surely the latter position must be put to the prosecution's witness so as to repudiate the improbability or truthfulness of the testimony of the said prosecution witness.

[169] And so, applying that logic to the instant appeal, whilst PW25 was unsure about the dates/month as to when the appellant got in touch with him and when the shotgun was handed over and taken back for test-firing and collected the next morning (6am) and returned the same day (9am), he was nevertheless *crystal clear* in his testimony that after the shotgun was given to him (by the appellant), the latter came back one evening and took the weapon for testing at a secluded spot in Bakam.

[170] According to PW25, he accompanied the appellant to the secluded spot in Bakam. He said that the appellant used live cartridges to test the weapon. It is important to note, that during cross-examination it was put to PW25 that he did not accompany the appellant when he (appellant) took the weapon for testing. The learned judge believed PW25's testimony — that he followed the appellant one evening when the latter took the weapon back from PW25, and went to Bakam to test fire the weapon. PW25 did say during cross-examination that the appellant informed him about taking the weapon to the logging camp, but he said he did not know whether the appellant had intended to take the weapon to the logging camp for purposes of hunting animals.

[171] According to PW25, after the weapon was tested, the appellant had told PW25 that he would come back the next morning at 5am to collect the weapon. The appellant came at 6am the next morning and took back the weapon. PW25 said that he then heard that a murder had taken place. At 9am the same day, the appellant returned the weapon to PW25. PW25 was arrested on 1 July 2016.

[172] The question here is whether the critical date of the transaction between the appellant and PW25 took place on the eve of the murder and whether the appellant took back the weapon the next morning at 6am and returned the weapon at 9am and a murder took place in the intervening period which got to the ears of PW25.

[173] Or did, as the appellant contends, PW25 get it all mixed up and the transaction actually took place on 30–31 May 2016 as per the appellant's testimony during the trial. The appellant said that he could remember this because he returned the weapon to PW25 on the *eve of the Gawai festival*.

[174] The learned judge said that the appellant's version as to the transaction taking place on the eve of the *Gawai* holiday festival was improbable in that if the appellant could remember this date, PW25 being a furniture shop owner, should also have remembered the date. The appellant's counsel criticised the learned judge's said analysis and evaluation of the appellant's credibility. Counsel said that the learned judge had descended into the realm of speculation.

[175] In our view, the issue of the appellant's credibility can very readily be determined by asking the following question. If indeed the transaction of the handing over of the shotgun to PW25 took place on the morning of 30 May 2016 and it was taken back in the evening of the same day and then returned to PW25 only on 31 May, 2016 (the eve of the *Gawai* festival) *was it not incumbent on the appellant to put this narrative to PW25 during cross-examination?*

[176] We think that in the circumstances of the case, it was both important, imperative and pivotal for the appellant to have put to PW25 that the transaction did not take place on the day as described by PW25 wherein after the appellant had collected the weapon in the morning and before it was returned to him, PW25 heard that a murder had occurred.

[177] Obviously, the appellant had kept the dates (30 and 31 May 2016) very 'close to his chest' and narrated it for the first time on 21 May 2018 when he gave evidence. In these circumstances it is hardly surprising that the learned

judge gave short shrift of the appellant's theory that all of these took place on 30 and 31 May 2016 rather than (as PW25 testified) on the day when a murder took place.

[178] Hence, by reason of the appellant's failure to put to PW25 that the transaction took place on 30 and 31 May 2016 and not as he had described it, the reasonable inference is that it is an 'afterthought' or 'recent invention'.

[179] In this context we think that it is necessary to advert to the principle of law that is applicable with regard to the need for the accused to put his version to the prosecution's witness, failing which the omission may become the building block for the inference that the accused's version (when the defence is called) is an afterthought and a recent invention.

[180] In our view, the correct position in law is that whilst there is no duty or obligation or burden on the accused to prove his innocence, a failure to put the necessary version to the prosecution's witness will have a deleterious and damaging effect on the credibility of the accused when he later testifies (if his defence is called) and gives a different version.

[181] The law on this issue is lucidly discussed in the Court of Appeal's decision in *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 154; [2008] 1 LNS 547 (CA) where Abdull Hamid Embong JCA said:

> [63] Although in our criminal jurisprudence, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought, or a recent invention as happened in this case.
>
> [64] Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138 puts this principle in these now famous words:
>
> ... there is a general rule that a failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of a witness's testimony.
>
> [65] In our adversarial system, that principle is applicable in both civil and criminal trials.
>
> [66] The appellant's defence can be ascertained not merely from his own evidence but also the line of cross-examination of the prosecution's witnesses (see *Kuli & Ors v Emperor AIR* [1930] Cal 442, cited in *Public Prosecutor v Data Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215). This has been termed as a rule of essential justice.
>
> [67] In *AEG Carapiet v AY Derderian AIR* [1961] Cal 359, (also cited in the *Data Seri Anwar*'s case), this principle was explained in this manner:

A It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses.

B It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examination that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.

[68] It is our view that the trial judge was right in finding that the appellant's defence C as suspicious or inherently improbable. We have however reminded ourselves that the trial court is still bound to consider that defence and that the obligation is upon the prosecution to prove its case beyond a reasonable doubt (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996]1 CLJ 705).

D **[182]** We do not think that the appellant is entitled to say that he need not have put this to PW25 when the latter was under cross-examination.

[183] On the contrary, we think that the learned judge was correct in his assessment of the evidence and in believing PW25's evidence (and obviously E disbelieving the appellant) despite the fact that PW25 initially said that the appellant contacted him in the middle of June 2016 and later said that he could not be sure of the date and month when the appellant contacted him.

[184] Even if it is apparent that PW25 was unsure of the month/date when F the appellant first contacted him or when the shotgun was handed over, such imprecision on PW25's part can only be described as a discrepancy which, on the facts and overall circumstances of the instant appeal, does not whittle down his credibility or truthfulness. As such, it seems highly improbable, unlikely or truthful that the transaction occurred on 30 and 31 May 2016.

G

[185] In this regard, we think that the following passage from the case of *Pie Bin Chin v Public Prosecutor* [1985] 1 MLJ 234 (HC) deserves mention. In that case, Wan Yahya J said (pp 235–236):

H Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so I irreconcilable, ambivalent or negational that his whole evidence is to be disregarded. Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief.

Various persons are endowed with varying powers of cognition, attentiveness and

perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions. Thus the slight dissimilarity between the evidence of the complainant and his wife is explicable. It was further contended that the inconsistencies in the evidence of the complainant itself should make his story unreliable. It is true that he gave capricious accounts of certain facts but then those matters relate mostly to subsidiary issues. He was understandably vague on details on sequence of events relating to the payments but of the payments themselves and the amount paid on each occasion the witness's evidence was positive and categorical.

[186] The DPP had submitted before us that on the facts and circumstances of this particular case, the focus should not be on dates, but rather it should be directed at PW25's acute recollection of the events on the days preceding the day of the murder and the day of the murder itself. He said that PW25's inability to give the exact dates is not a discrepancy nor does it create a gaping hole in the prosecution's case especially when the evidence is taken holistically together with all the other circumstantial evidence.

[187] In this regard, looking at all the evidence in the round, we do not think that the learned judge had erred when he concluded that there was an evil purpose for the test-firing of the weapon in a secluded place in Bakam.

[188] We also do not think that it was wrong for the learned judge to have associated the evil purpose with the meeting between the appellant and PW25 outside the pub where the appellant had shown the photo of a male person and said that he 'wanted' the man and asked PW25 whether he wanted to join in doing 'something'.

[189] No doubt, PW25 could not identify the 'man' when he was shown a photograph of the deceased (exh P6(3) in court. But nevertheless, the learned judge relied on these two occurrences as suggesting that the appellant had a more sinister purpose vis a vis the test-firing of the weapon. The learned judge did not believe the appellant who said that the test-firing was for the purposes of hunting animals.

[190] In this regard, we are unable to agree with counsel's submission that the test-firing in Bakam was a prelude for a benign purpose and that secrecy was due to the fact that the appellant did not have the requisite gun licence to be in possession of the weapon, much less to carry out test-firing. It is obvious enough that in terms of chronology, the meeting outside the pub took place before the test-firing took place.

[191] In our view, it hardly matters whether the 'first contact' between the appellant and PW25 took place in the middle of June 2016. What really

matters is that there was an initial 'contact' and at some point in time after the first contact, the weapon (exh P132) was handed over to PW25 for 'safe-keeping' ('hidden').

[192] We also find it odd that a submission was made that the 'deceased died before any shotgun was handed over by the appellant to PW25'. There is no evidence at all to support the theory that the weapon was handed over by the appellant to PW25 *after* the deceased had died. From the evidence of PW25, it is clear that the appellant took the weapon in the morning at around 6am and returned it at around 9am and before the weapon was returned to PW25, the latter had heard that a murder had occurred.

[193] The learned judge made a finding of fact that PW25 was telling the truth and did not exaggerate or embellish the facts and where he was unsure, he candidly said that he was not sure.

[194] If, as suggested by counsel for the appellant, PW25 had done a deal with the police, then his evidence would have been precise and detailed in regard to the relevant date(s) and month. In fact, if he had been coached, PW25 would have readily identified the deceased when the photograph was shown to him in court. Instead, PW25 was truthful and said that he could not identify the person in the photograph.

[195] The appellant contended that PW25 was not a credible witness as he was detained under the POCA and was in possession of a firearm without a valid licence and as such, he had given evidence to implicate the appellant with the murder of the deceased. There is no reason why PW25 would want to implicate the appellant. In fact PW25 did not even say that the appellant was responsible for the murder of the deceased. The learned judge found that there was no reason for PW25 to lie. As a matter of fact, he was not an accomplice to the murder of the deceased.

[196] It bears repeating that the circumstantial evidence here is not just the oral testimony of PW25, although his evidence constituted a key component of the circumstantial evidence. PW25 had provided the necessary building blocks for circumstantial evidence against the appellant. The prosecution pieced the building blocks together and built its case against the appellant.

[197] Thus, the prosecution contended that based on the testimony of PW25 and the circumstances and timing of the shotgun transaction as alluded earlier and the discovery of the shotgun, live bullets (12 gauge), cartridge shell (12 gauge) and face mask (containing the appellant's DNA) coupled with the fact that the wad which was retrieved from the wound track was also consistent with 12 gauge ammunition (used for shotgun) and based on PW20's evidence as

regards the land dispute with Tung Huat Co, the threat by the appellant and the intimation by the deceased that he had been threatened, cumulatively constituted strong circumstantial evidence which pointed irresistibly to the guilt of the accused vis a vis the murder of the deceased.

[198] No doubt, the appellant contends that the utterances by the deceased to PW20 that he had been threatened (see para 20–22 above), is 'hearsay' and inadmissible. However, we see no merit in the complaint as it is evidence of 'motive' and admissible under s 8(1) of the Evidence Act 1950, albeit, (as found by the trial judge) a 'weak strand' of circumstantial evidence, but is evidence nevertheless.

[199] The question before the learned judge was whether the appellant had test-fired the shotgun (exh P132) (in the presence of PW25) in a secluded place in Bakam on the eve of the deceased's murder and whether on the day of the murder (21 June 2016) the appellant had taken the shotgun back from PW25 at around 6am and returned it at 9am and before the weapon was returned, PW25 had heard that a murder had occurred.

[200] The other question for the learned judge was whether it was a matter of pure coincidence that the wad which was retrieved from the wound track was from a 12 gauge cartridge which is used in shotguns and/or that the spent cartridge shell which was recovered from the pouch from PW25's ceiling was for a 12 gauge cartridge and/or that the shells from the shotgun cartridges which were recovered from the pouch were also 12 gauge cartridges. When viewed in totality, it can hardly be said that these were all a matter of pure coincidence and that there was nothing but suspicion that the appellant was the shooter. This brings us to the topic of the face-mask which had the appellant's DNA on it.

[201] The appellant said it was put over his head by the police when he was handcuffed. It is a plausible theory, but not in the least probable or truthful as this should have been, but was not put to the investigating officer (PW28) or the arresting officer (PW 13). It is thus of no surprise that the learned judge rejected the appellant's explanation as to how his DNA got onto the face mask.

[202] It was argued for the appellant that the face mask, even if it had the appellant's DNA on it, was irrelevant because the timelines do not fit. On the contrary, we think that the presence of the appellant's DNA on the face mask is very telling and supports the inference that the shotgun was used for a sinister purpose — the murder of the deceased. There is and can be no other explanation for the use of a face-mask. It is clear that the appellant has taken great pains to set the timelines at large and at any rate, well away from 21 June 2016.

A **[203]** In the first place, the appellant purported to say that the transaction with PW25 took place on 30 and 31 May 2016. But this was never put to PW25 when he testified. Next, the appellant purported to say that the weapon was handed over to PW25 after the deceased had been killed. It is clear to us that the appellant is himself prevaricating and being inconsistent on the
B timelines. We disagree with the appellant's submission that the learned judge's findings were based on a misconstrued timeline to fit the alleged actions of the appellant into the date and time the deceased was murdered.

C **[204]** Next, in so far as the purported alibi is concerned, it is to be noted that it surfaced only after the prosecution had closed their case and defence was called. In the notice of alibi, the appellant had stated that he 'will be adducing evidence that on 21 June 2016 at about 8.20am, he was at food stalls by the road side at the junction between Jalan Sukma and Lorong Desa Senadin 2C, Senadin, Miri, Sarawak, before during and subsequent to the time of the
D offence with which he is charged', but at the trial, the appellant merely gave his own oral testimony to support his so-called alibi.

E **[205]** He said that he was working at KTV Blue Coast as a bouncer and that on 21 June 2016 he was at his workplace until 7.10am He then drove his Kembara WHV6477 (which was allegedly giving trouble) and went to the Maybank branch near to Grand Palace Hotel.

F **[206]** He said he went there to collect RM900 from a person called 'Man'. He said that the sum of RM900 was for the deer meat which he had given to Man earlier on 31 May 2016. He said that he left the Maybank branch around 7.30am and went to the road side stalls as per his notice of alibi.

G **[207]** He claimed that he was at the stalls from 8.20am and remained there until 10am and then went to the motor workshop to have his motorcar attended to. The so-called Man did not testify. There were no witnesses who were called who could have corroborated the appellant's testimony on his alibi. The appellant said that he could not contact Man or other witnesses because he was in prison.

H

[208] There are obviously some searching questions concerning the alibi, which must be answered. For instance, who is the person called 'Man' and why was it that he was only mentioned for the first time in court when the appellant was testifying? If the appellant was with Man from about 7.10am–7.30am,
I then it could possibly form the building block for the alibi. Why didn't the appellant procure Man's presence in court?

[209] Next, given that it is the prosecution's case that the appellant collected the murder weapon from PW25 at 6am and returned it at 9am on the day when

a murder had occurred, why didn't the appellant get his employer from KTV Blue Coast to testify and confirm that on 21 June 2016, the appellant had worked at the club from the preceding night (9pm) until 7.10am the next day (21 June 2016)?

[210] That is a crucial aspect of the appellant's alibi and if he had tendered credible evidence to show that he was at his work place all through the night until 7.10am on 21 June 2016, then that might have caused a serious dent in the prosecution's case. There is no valid explanation as to why the so-called Man was not called to testify. The fact that the appellant was in prison is hardly an excuse for not calling the so-called Man (if at all such a person existed).

[211] Similarly, there is no valid explanation as to why no one from KTV Blue Coast was called to testify and corroborate the appellant's version of his whereabouts.

[212] The learned judge concluded that the alibi defence is a sham and that the appellant had been 'deliberately imprecise' about his alibi. He did not tell the police during the investigation phase that he met 'Man' at the Maybank area near the Grand Palace Hotel and did not give the names of anyone he met during the two hours he spent at the coffee shop in question. The learned judge said that is was an 'an alibi bereft of details and which was kept up his sleeve until the case for the prosecution was almost completed (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705). Thus, the conclusion that it was a recent invention cannot be avoided'.

[213] We agree with the conclusion that was reached by the learned judge and we similarly hold the view that it was a sham alibi and was quite obviously the product of a 'recent invention.' We find the appellant's complaints with respect to the matters alluded above to be weak, meek and belated.

[214] In our view, the appellant's denials and his purported alibi were of such a nature and quality that when they are tested against the preponderance of evidence, they are incapable of creating of raising a reasonable doubt as to the guilt of the appellant.

[215] In this regard, it is important to mention that as the party who put forward the defence of alibi, the (evidential) burden was on the appellant to prove his alibi to the satisfaction of the court.

[216] The burden of proof of the defence of alibi is provided for in s 103 of the Evidence Act 1950, which states, 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular

person'. More to the point is illustration (b) which states: 'B wishes the court to believe that at the time in question he was elsewhere. He must prove it'. Clearly, the appellant had failed to discharge the burden in this regard. In the circumstances, we are of the view that the learned judge correctly rejected the defence of alibi.

[217] It is of course axiomatic that once the prosecution had established a prima facie case and the appellant was called upon to enter his defence, it fell on the appellant to raise a reasonable doubt. What then is reasonable doubt? In this regard, we prefer the definition of reasonable doubt that was given by Thompson CJ in *Liew Kaling & Ors v Public Prosecutor* [1960] 1 MLJ 306b; [1960] 1 LNS 60 where he said:

> No doubt in this country where the historical background is very different from that in England if the expression 'reasonable doubt' is used then some effort must be made to explain it. We are not, however, unduly impressed with the difficulty of doing so.
>
> We are not laying down or commending any formula. There are, however, in existence two examples of how the point can be expounded, a consideration of which convinces us that there is no real difficulty.
>
> The first of these passages is from the judgment of Denning J (as he then was) in the case of *Miller v Minister of Pensions* [1947] 2 All ER 372 at p 373 where His Lordship thus described the degree of proof required in criminal cases:
>
> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.
>
> If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable.' the case is proved beyond reasonable doubt, but nothing short of that will suffice.
>
> The second passage is from the summing-up of Lord Hewart CJ in *Podmore*'s case 22 Cr App R 36 where His Lordship used the phrase 'beyond reasonable doubt' and then went on to say (the passage is from the transcript):
>
> You will not, I am sure, allow yourselves to be bewildered or troubled by such a phrase.
>
> What it means is not some whimsical or fanciful doubt, which a person might conjure up for the purpose of creating a difficulty, but such a doubt as would govern a man's course of action in some private affair of moment of his own.

[218] Further, we also find the discourse on reasonable doubt that was given by Sharma J in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; [1971] 1 LNS 115 to be particularly helpful. He said:

> The following definition of 'reasonable doubt' is often quoted:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
>
> It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt.
>
> It is a doubt which settles in your judgment and finds a resting place there.
>
> Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

[219] Having examined the evidence in totality and having considered the learned judge's grounds of judgment and submissions of the parties to this appeal, we are impelled to the conclusion that the appellant has not raised any reasonable doubt in relation to his culpability in the murder of the deceased on 21 June 2016. Having carefully considered the submissions of learned counsel for the appellant and the learned DPP, and having re-evaluated all the evidence ourselves, we are also of the unanimous view that those remaining strands are of such strength and do meet the requirements as laid down in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22 (CA) and recently again by the Federal Court in *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137; [2017] 3 AMR 105; [2017] AMEJ 371 (FC) (see also: *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC)).

[220] In the result, for the several reasons adumbrated above, we agree and concur with the learned judge that the circumstantial evidence tendered by the prosecution irresistibly proved that it was the appellant who murdered the deceased on 21 June 2016 as per the charge and that the evidence did not point to any other explanation which may exculpate the appellant.

[221] Based on the evidence of the prosecution and the evidence of the appellant, we are of the view that the appellant had failed to raise a reasonable doubt as to his culpability in the offence with which he was charged, to wit, the murder of the deceased on 21 June 2016.

[222] Consequently, upon our analysis of the case as a whole, we find the conviction for the offence of murder under s 302 of the Penal Code to be safe and we have no reason to disturb the learned judge's findings of fact.

[223] The appeal is therefore dismissed and the decision of the learned judge dated 10 August 2018 is affirmed and the conviction and sentence for the offence of murder under s 302 of the Penal Code are hereby affirmed.

Order accordingly.

Appeal dismissed; and conviction and sentence affirmed.

Reported by Nabilah Syahida Abdullah Salleh